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The Honorable Robert H. Whaley

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
MAR 17 1999
JAMES R. LARSEN, CLERK
DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT E. WHITE, et al.,

Plaintiffs,

v.

DR. C. ALVIN PAULSEN, et al.,

Defendants.

DON BYERS, et al.,

Plaintiffs,

v.

C. ALVIN PAULSEN, M.D., et al.,

Defendants.

No. CS 97-0239 RHW

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO CERTIFY DEFENDANTS' QUALIFIED IMMUNITY APPEAL AS FRIVOLOUS

Noted For Telephonic Oral Argument On April 21, 1999 at 10:30 a.m.

## I. INTRODUCTION AND RELIEF REQUESTED

Nearly forty years ago, defendants Paulsen, Rhay and Conte began a series of non-consensual testicular radiation experiments at the Walla Walla State Penitentiary, using uneducated and vulnerable inmates as their unwitting subjects. In the decades that followed, the defendants concealed critical facts regarding the experiments in order to hide their transgressions, and avoid being sued.



ORIGINAL

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Finally, when this Court denied the defendants' motions for summary judgment regarding the statute of limitations and qualified immunity, the defendants recognized that the day was approaching when they might have to answer for their conduct before a jury. To try to further delay and avoid a trial, the defendants filed a Notice of Appeal regarding the qualified immunity ruling. This is a transparent attempt to divest the trial court of jurisdiction and delay trial for several more years – a particularly jarring tactic in a case where defendants have already forestalled adjudication for decades, and many plaintiffs are in jeopardy of dying while defendants try to pursue legal niceties on appeal.

Defendants should not be allowed to further delay adjudication on the merits. Because their appeal is without merit, plaintiffs ask the Court to enter an order, under Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992), certifying the appeal as frivolous. In making this request, plaintiffs do not contend that the qualified immunity defense, in and of itself, is frivolous. Rather, plaintiffs contend only that the defendants' claim that they are immune from liability as a matter of law is wholly unsupported by the record. Thus, defendants' appeal of the Court's denial of their motion for summary judgment on the qualified immunity defense is frivolous, because the legal issues are well settled, and the factual issues are not appealable at this time. Significantly, an order certifying the appeal as frivolous does not affect the appeal. It does, however, allow this court to retain dual jurisdiction during the appeal, and thus for the case to proceed to trial without further delay.

## II. PROCEDURAL BACKGROUND

In September, 1998, defendants Paulsen, Rhay and Conte filed motions for summary judgment, asking, among other things, that the claims against them be dismissed on statute of limitations and qualified immunity grounds. On January 20, 1999, this Court denied those motions. See Exhibit A ("SJ Order"). With regard to the qualified immunity motion, the Court held that the right asserted by the plaintiffs, i.e. the right to be free from non-consensual medical experimentation, was clearly established nearly twenty years before the Paulsen experiments were even commenced. SJ Order at 24-25. Further, the Court found that the record presented substantial questions of fact regarding whether a reasonable official would have believed that the defendants' conduct was lawful.



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Indeed, the Court noted that the record would "require substantial development" before one could find for the defendants in this regard, even as a question of fact. SJ Order at 25.

By virtue of the Court's order, the case was ready to be set for trial. Then, on February 19, 1999, defendants Rhay, Conte and Paulsen filed a Notice of Appeal raising a single issue:

> Whether the trial court erroneously declined to hold the plaintiffs' claims are barred, as a matter of law, under the qualified immunity doctrine.

See Defendants' Attachment to Civil Appeals Docketing Statement at 1, attached hereto as Exhibit B.[1] Defendants contend that, under Behrens v. Pelletier, 516 U.S. 299 (1996), Mitchell v. Forsyth, 472 U.S. 511 (1985), and Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992), the Court's interlocutory ruling on qualified immunity is immediately appealable as of right, and that filing the Notice of Appeal divested the trial court of jurisdiction. See Joint Status Report, attached hereto as Exhibit C.

## III. ARGUMENT AND AUTHORITIES

### A. The Court Has the Authority to Retain Jurisdiction by Certifying Defendants' Appeal as Frivolous.

Defendants seek an interlocutory appeal under the Collateral Order doctrine, which permits interlocutory appeals of a small class of decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, (1949). In Mitchell v. Forsyth, 472 U.S. 511 (1985), the Supreme Court held that the denial of a defendant's motion for

[1] Other appellants have argued that a court cannot certify an appeal as frivolous based simply on a Notice of Appeal, because it cannot know the subject matter of the appeal from the notice of appeal itself. This argument was summarily dismissed in Thompson v. Farmer, 945 F. Supp. 109 (W.D.N.C. 1996), in which the court observed that it acquired sufficient knowledge regarding the nature of a potential appeal when ruling on summary judgment motions. Because the defendants cannot raise new theories on appeal, this Court is in a position to know the frivolous nature of the appeal.



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summary judgment based on qualified immunity was a "collateral order" for which interlocutory appeal was available.

Even as they permitted interlocutory appeals of qualified immunity orders, however, members of the Supreme Court recognized the potential for abuse, i.e., that such appeals were "a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory appeals" and denying "full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the caseload of appellate courts." Mitchell v. Forsyth, 472 U.S. at 556 (Brennan, J. concurring in part and dissenting in part). To limit such abuse, interlocutory appeals regarding rulings on qualified immunity are limited strictly to issues of law, and are not permitted for rulings which turn on issues of fact. Id. at 530; Johnson v. Jones, 515 U.S. 304 (1995). Further, the district courts have the authority to retain jurisdiction if the appeal has been waived, or if it certifies the appeal as frivolous. Chuman, 960 F.2d at 105; Behrens v. Pelletier, 516 U.S. 299, (1996) (recognizing authority of district courts to certify qualified immunity appeal as frivolous); Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989) (same); Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991) (same); Stewart v. Donges, 915 F.2d 572, 577 (10th Cir. 1990) (same). Such certification creates dual jurisdiction with the appellate court, thus allowing trial to proceed during the appeal. Chuman at 105.

In its order denying defendants' motions for summary judgment, the Court considered three issues regarding the qualified immunity defense:

> Three elements must be established to invoke qualified immunity: (1) the right asserted must be identified; (2) the right must have been clearly established when the wrongful acts occurred; and (3) a reasonable official could not have believed his acts were lawful.

S.J. Order at 24. As discussed below, the first two issues are questions of law, for which the appeal is frivolous under controlling caselaw. As to the reasonableness of the defendants' conduct, plaintiffs do not contend that the defendants cannot raise this defense at trial. However, given the record in this case, it is clearly a factual issue. Thus, it is not properly the subject of an interlocutory appeal,



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and the appeal of the Court's denial of defendants' motion for summary judgment on this issue is therefore frivolous.

**B. The Appeal of the Court's Ruling Regarding the Nature of the Rights Asserted by Plaintiffs Is Frivolous.**

The only issues of law which can properly be raised before the Court of Appeals at this time are whether the rights asserted by the plaintiffs were identified and clearly established at the time when the wrongful conduct occurred. In this regard, the Court ruled that the right asserted by plaintiffs, i.e., the right to be free from non-consensual human experimentation, was identified and established well before 1946, twenty years before the Paulsen experiments were conceived and perpetrated, citing Stadt v. University of Rochester, 921 F.Supp. 1023, (W.D.N.Y. 1996). SJ Order at 24-25. In so holding, the Stadt court relied on no less than four Supreme Court cases:

> See Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 812, 127 L.Ed.2d 114 (1994) (finding that "the protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.") (citations omitted); Schmerber v. California, 384 U.S. 757, 772, 86 S. Ct. 1826, 1836, 16 L.Ed.2d 908 (1966) (stating that "[t]he integrity of an individual's person is a cherished value of our society."); Skinner v. State of Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (holding that sterilization performed without consent deprived the individual of a "basic liberty."); Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L.Ed. 734 (1891) (finding that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

Stadt at 1027.[2] There can be no appeal where the Supreme Court has decided the issue. Given such clear authority, defendants' appeal of the Court's ruling on these first two legal issues is frivolous.

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[2] See also In Re Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995) (right to be free from non-consensual human experimentation was clearly established by 1946, adopting Stadt); Bibeau, et al. v. PNRF, et al. No. 95-6410, slip op. at 25-29 (D. Ore. Sept. 27, 1996) at 25-29 (same; relying on Stadt, In Re Cincinnati and supporting cases), attached hereto as Exhibit D. Furthermore, plaintiffs are unaware of any similar government-sponsored human radiation case where any court,



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### C. The Appeal of the Court's Ruling Regarding the Reasonableness of Believing That the Conduct Was Lawful Is Frivolous.

#### 1. The Ruling Is Factual in Nature, and Thus Is Not Immediately Appealable.[3]

The Collateral Order doctrine allows interlocutory appeal only of issues of law. Where a qualified immunity summary judgment is denied because of disputed issues of fact, however, the order is not immediately appealable. Johnson v. Jones, 515 U.S. 304, (1995). In so holding, the Supreme Court reasoned that 1) its own precedent, in Mitchell v. Forsyth, only allowed appeals for denial of a claim of qualified immunity to the extent that it turns on an issue of law; 2) the factual nature of the inquiry does not render the summary judgment determination a "final decision" under 28 U.S.C. §1291; and 3) the underlying policies, including the danger of denying justice by delay and the relative expertise of trial judges in determining the existence or nonexistence of triable issues of fact support the conclusion that fact-based qualified immunity appeals are inappropriate. Id. at 313-315. Thus, qualified immunity motions that fail because of "evidence sufficiency," i.e., which facts a party may, or may not, be able to prove at trial, are not appealable. Id. at 313.

The defendants' argument on summary judgment, in essence, was that their conduct was reasonable as a matter of law, and thus there is no question of fact regarding whether other reasonable officials in similar circumstances would have believed the defendants' conduct to be legal. However, the record reflects evidence from which a jury could conclude that the defendants conducted non-consensual human radiation experiments on inmates who, by virtue of their incarceration, were unable to consent to such procedures. Moreover, the record includes evidence that the defendants procured the inmates' cooperation by a series of material fraudulent

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trial or appellate has granted any defendant's qualified immunity motion. Defendants cited no authority to the contrary.

[3] Plaintiffs do not ask this Court to determine the jurisdiction of the Court of Appeals. However, this Court can make a determination that an order is not immediately appealable, and for that reason certify the appeal as frivolous. See Bean v. City of Buffalo, 822 F. Supp. 1016 (W.D.N.Y. 1993) (certifying qualified immunity appeal as frivolous because of the need to resolve genuine issues of material fact).



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misrepresentations and omissions regarding the risks of the radiation, and through coercive promises of monetary compensation and favorable treatment, including possible early parole. The Court held that whether other reasonable officials would have believed the defendants' actions to be legal was not a matter of law, "but of moral perception. The record will require substantial development to determine if what was going through defendants' minds at this time could have reasonably gone through the minds of those similarly situated." SJ Order at 25 (emphasis added). Thus, the necessary inquiry is overwhelmingly and indisputably factual. Under Johnson, the SJ Order regarding the reasonableness of a belief that such conduct was legal is not appealable at this juncture.

Numerous other courts have held that a denial of qualified immunity is not properly the subject of an interlocutory appeal (and, therefore, is frivolously appealed) where the denial was premised upon existence of factual issues. See Bean v. City of Buffalo, 822 F.Supp. 1016 (W.D.N.Y. 1993) (qualified immunity appeal frivolous because fact-related); Heller v. Woodward, 735 F. Supp. 996 (D.N.M. 1990)(same). This is particularly so when the issue turns on the perceived reasonableness of the conduct at issue. See, e.g., Dickerson by and Through Stephens v. McClellan, 844 F.Supp. 391 (M.D. Tenn. 1994)(where dispute is about the actions of the reasonableness of the defendant's actions, an appeal from denial of a motion for summary judgment should be deemed frivolous), vacated in part on other grounds, 37 F.3d 251 (6th Cir. 1989). This reasoning makes perfect sense: If there are factual issues, an appellate court is powerless to resolve them. Facts relevant to the qualified immunity defense must be adjudicated in the trial court, and in this case, by a jury. Witnesses will testify, the jury will credit or reject that testimony, and the factual issues will be resolved at trial.

Plaintiffs reiterate that they do not contend that a qualified immunity defense, in and of itself, is frivolous. Nor do they contend that the defendants cannot pursue this defense at trial. However, because whether a reasonable official would have believed that defendants' conduct was legal is undeniably a factual issue, it therefore does not present an issue of law, and cannot be the subject of



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an interlocutory Forsyth appeal. Any appeal of a ruling denying defendants' motion for summary judgment on this issue is therefore frivolous.

**2. The Appeal Is Frivolous on This Record.**

A frivolous qualified immunity appeal is one that is "unfounded; so baseless that it does not invoke appellate jurisdiction." Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989); Marks v. Clarke, 102 F.3d 1012, 1017 n.8 (9th Cir. 1996), cert. denied ____U.S. _____, 118 S. Ct. 264 (1997). Another court, certifying a qualified immunity appeal as frivolous, defined the standard as follows:

> [I]f in the district court's judgment there are true factual disputes that must be resolved at trial, or if there is no genuine dispute about the inappropriateness of qualified immunity, a Forsyth appeal should be certified as frivolous... [O]r if there is a dispute about the actions of the [defendants] and the disputes go the [sic] reasonableness of the actions, that appeal should be deemed frivolous...

Dickerson, 844 F. Supp. at 395. (emphasis added). Once again, under this standard, it is not the qualified immunity defense itself which is frivolous, but rather only the claim that a defendant is immune from liability as a matter of law.

As the Court noted, the defendants' argument regarding the reasonableness of their conduct was predicated on the "historical context" at the time of the experiments. But even in such context, given knowledge of the uniformly condemned Nazi prisoner experiments, one cannot argue that using inmates as guinea pigs was reasonably believed at that time to be legal as a matter of law, as all courts that have addressed this issue have squarely held. Nor can one argue that using any person in such experiments, in the absence of informed consent, was reasonably believed to be legal as a matter of law. In this case, as this Court has held, the record contains ample evidence from which a jury could find fraud on the part of the defendants in convincing the plaintiffs to "volunteer." Accordingly, on this record, no summary judgment in favor of the defendants on this issue could be granted. Indeed, as the Court noted, the record would require "substantial development" before the defendants could prevail on this issue even at trial. SJ Order at 25. As the defendants are limited to the existing record for purposes of this appeal, the appeal is frivolous.



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**D. Policy Considerations Favor Plaintiffs.**

Given the lack of substantive merit of defendants' appeal, their motive in pursing it becomes clear: to further delay trial on the merits. Such frivolous appeals seriously injure plaintiffs, because "[d]uring the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases)." Furthermore, "[m]ost deferments will be unnecessary. The majority of Forsyth appeals -- like the bulk of all appeals -- end in affirmance." Apostol, 870 F.2d at 1338. The Johnson court made similar admonishments about the dangers of delaying justice, which concerns are readily apparent here. Johnson, 515 U.S. at 315. The plaintiffs in this case are no longer young men. They have, in general, had difficult lives, and many are in poor health. Indeed, two plaintiffs have died since the case was filed. Affidavit of Keith D. Petrak in Support of Motion to Certify Appeal as Frivolous, ¶ 2.

Justice has been delayed long enough. Defendants fraudulently denied plaintiffs access to critical facts about the nature of the experiments being performed on their bodies, which give rise to this lawsuit, for more than thirty years. Now, defendants seek to further delay trial in a case that is already two and one half years old. Courts must not sit idly by as a frivolous appeal goes up, but rather should certify the appeal as frivolous, to get on with the trial. Apostol, 870 F.2d at 1339. So should this Court.

## IV. CONCLUSION

For the foregoing reasons, this Court should certify defendants' qualified immunity appeal as frivolous, retain concurrent jurisdiction with the Ninth Circuit Court of Appeals, and convene a status conference to determine a trial date and other relevant deadlines at the earliest possible date.

DATED this ____ day of March, 1999.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 16, 1999, a copy of the foregoing pleading was served upon the following individuals:

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EXHIBIT A

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAN 20 1999

JAMES R. LARSEN, CLERK
DEPUTY

# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF WASHINGTON

Robert E. White et al.,

Plaintiff(s),

vs.

C. Alvin Paulsen et al.,

Defendant(s).

No. CS-97-239-RHW

**JUDGMENT IN A CIVIL CASE**

RECEIVED
JAN 22 1999

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of the United States on Plaintiff's FTCA claim. FRCP 54(b).

DATED: January 20, 1999

JAMES R. LARSEN, CLERK

by Kelly Howard
Kelly Howard, Deputy Clerk

RECEIVED
JAN 22 1999
BYRNES & KELLER LLP

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
JAN 20 1999
JAMES R. LARSEN, CLERK
DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT E. WHITE et al.,

Plaintiffs,

v.

C. ALVIN PAULSEN et al.,

Defendants.

NO. CS-97-239-RHW

**ORDER GRANTING, *INTER ALIA*, GOVERNMENT'S MOTION TO DISMISS**

Before the Court are the Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Ct. Rec. 178); Defendant Conte's Motion for Summary Judgment re: Statute of Limitations (Ct. Rec. 180), which is joined in by all remaining Defendants, other than the United States and Defendants Totter and Liverman; the State Defendants' Motion for Partial Summary Judgment on State Law Claims (Ct. Rec. 182) and Motion for Partial Summary Judgment on Qualified Immunity (Ct. Rec. 184); Defendant Liverman's Motion for Summary Judgment on Statute of Limitations (Ct. Rec. 189) and Motion for Summary Judgment on Qualified Immunity (Ct. Rec. 191); and Plaintiff White's Motion for Leave to File Corrected Response (Ct. Rec. 202). Plaintiffs are represented by Stanley Siegel, Daniel Berger, Merrill Davidoff, Eric Cramer, Kendall Zylstra, Neil Mara, and Bradley Keller. Defendant Paulsen is represented by John Wilson and David Jacobi; Defendant Battelle Pacific Northwest Laboratories by William Squires; Defendants Totter and Liverman by Christopher Pickrell and Richard Montague; Defendant General Electric by Patricia Wagner; and Defendants Rhay and Conte by Michael Madden. These matters were argued on December 11, 1998.

## BACKGROUND

Between 1963 and 1971, the University of Washington ["UW"] conducted experiments in which volunteer inmates at the Washington State Penitentiary ["WSP"] were subjected to ionizing radiation of their testes to determine effects. The inquiry was headed by Dr. Alvin Paulsen, a member of the UW faculty. UW was operating under contract to the United States Atomic Energy Commission ["AEC"]. **Ct. Rec. 181, Ex. E.**

In announcing the need for volunteers, WSP advised that temporary, or even permanent, sterility was a possibility. ***Id.*, Ex. G.** The consent form each Plaintiff signed was more explicit, and advised that permanent sterility was foreordained because a vasectomy would be performed at the conclusion of testing. ***Id.*, Exs. H-I.** The consent form also cautioned that "this is a scientific experimentation and its consequences cannot be entirely known." ***Id.*** More than 60 inmates participated during the eight-year investigation. Each received a single dose of radiation ranging from 7.5 to 400 rads. **Ct. Rec. 199, Ex. 72.** The dose was both preceded by and followed by biopsies of the testes to determine effects on sperm production. All of the named Plaintiffs sustained unpleasant effects, ranging from "normal discomfort" to episodic testicular burning and swelling. **Ct. Rec. 181, Ex. J.** At least some testicular pain was common to virtually all participants. The program started to wind down in 1969 after a number of media reports characterized it as "barbaric," and analogized to experiments performed in the Nazi death camps. ***Id.*, Exs. 1-55.**

On July 25, 1969, the Research Director of the Washington Department of Institutions [DOI] (now Department of Corrections), directed a letter to UW expressing reservations about the Paulsen study, and questioning whether WSP should have ever gotten involved. **Ct. Rec. 199, Ex. 74.** The letter closed with the query "if medical students at the University of Washington were asked to volunteer for this experiment and did so, would you let them?" On March 13, 1970, DOI's Research Review Committee

expressed grave concern about the ethics of the study, calling into doubt whether an incarcerated person was capable of giving informed consent. ***Id.*, Ex. 73.** It seems to be agreed by all that Plaintiffs were motivated by the money offered by Paulsen, and secondarily by his promise to put in a good word for them when their parole hearings came up. The project was terminated shortly thereafter.

Skipping forward 23 years, on December 7, 1993, Secretary Hazel O'Leary of the Department of Energy ["DOE"] held a press conference in which she disclosed the agency's role in conducting radiation experiments on humans. **Ct. Rec. 199, Ex. 85.** With the end of the cold war and the advent of a new era in international relations, DOE had determined that it was time to be more open about such matters as well as other nuclear-related information not affecting national security. O'Leary promised a massive declassification program. She did not specifically refer to the Paulsen project, but disclosed that perhaps as many as 800 human radiation experiments had been performed. She expressed shock upon learning of these studies, and felt there ought to be some way for the subjects of the experiments to be made whole. In response to a reporter's question, she stated "Will we be sued? . . . we'll take it as it comes." ***Id.***

Plaintiffs interpret her statements as holding out hope for voluntary governmental compensation, but that is not a fair reading.[1] What O'Leary did do with her comments about the victims being made whole, about the possibility of suit, and about the repressive information policies that had historically characterized her agency and its predecessor, was to virtually invite litigation.

Shortly thereafter, DOE opened a telephone hotline so that the subjects of the experiments could report their status. Some of the Plaintiffs took advantage of the offer and used the hotline in the belief that O'Leary was talking about them. Also shortly thereafter, President Clinton directed agencies involved with human radiation

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[1]O'Leary's call for compensation came not from her press conference, but from a CNN program on which she appeared. **Ct. Rec. 199, Ex. 84 at 67.**

experimentation to take measures to identify and preserve all materials relevant to the experiments and their subjects. ***Id.*, Ex. 86.**

These consolidated suits followed. Plaintiffs report a panoply of maladies ranging from none other than fear of cancer, to sexual dysfunction, to debilitating bowel and bladder problems, to precancerous conditions.

## DISCUSSION

The motions will be grouped according to subject matter where appropriate so as to avoid duplicative effort. Several points bear noting at the outset. First, the case relied upon most heavily by all defendants is now before the Ninth Circuit. *Bibeau v. Pacific Northwest Research Found.*, 980 F. Supp. 349 (D. Or. 1997), *appeal pending*.[2] For reasons to be addressed further, the Court declines to endorse *Bibeau*'s categorical approach. Second, much of the briefing is written as though this were a class action. It is a putative class action, but has not been certified pursuant to Rule 23(c). There has been no determination that the proposed representatives, in fact, satisfy the typicality and adequacy requirements.

### A. Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction[3]

Filing an administrative claim within 2 years of the accrual of a cause of action is a jurisdictional requisite under the Federal Tort Claims Act ["FTCA"]. 28 U.S.C. § 2675(a). The Court previously held that White's letter to DOE dated August 26, 1996 constituted a claim. Order entered March 17, 1998 at 4. **Ct. Rec. 168.** The letter arguably failed to state a sum certain, but extending the content a liberal reading, the Court found that White placed at least a $5,000,000 price tag on his injuries.

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[2]*Bibeau* was argued on September 15, 1998 and is now under submission.

[3]The motion is directed to White and to the 15 "new" Plaintiffs. McClellan's FTCA claim was previously dismissed (Order entered March 17, 1998), and Plaintiffs in the trailing case (CS-95-573-RHW) did not name the Government or any of its employees as Defendants.

The remaining question is accrual. White had substantial contact with physicians both during incarceration and after his release in 1968 in which he presented complaints relating to his testes and scrotal area. He knew in 1972 that he was permanently sterile. **Ct. Rec. 199, Ex. 1 at 248-49.** However, there is no need to consider what White knew or should have known over the course of these many years, or why he waited until 1994 to ask a physician directly whether there might be a causal connection between the irradiation and his complaints, because it is abundantly clear from White's letter of January 11, 1994 to DOE that he made the connection between the radiation experiments and his medical conditions:

> Dear Secretary O'Leary:
>
> I am one of 60 radiation/nuclear guinea pigs exposed to x-ray radiation testing during the 1960's while I was an inmate at the Walla Walla state prison facility. I was exposed to a dose level of 400 rads. Dr. Alvin C. Paulsen was the doctor in charge of the Atomic Energy Commission/ University of Washington joint project.
>
> I am worried about longterm effects on my health and life. This worry is ever present in my thoughts and interferes with my enjoyment of life. I am now, and for some time have been, feeling pain and discomfort in the area of exposure, i.e., genitals and surrounding soft tissue.

**Ct. Rec. 156, Exhibit A.**

That ends the inquiry. *United States v. Kubrick*, 444 U.S. 111, 119-22 (1979) (claim accrues when claimant knows of injury and cause). White all but concedes that his claim accrued in January 1994. Plaintiffs' Response at 118 n.60 **(Ct. Rec. 205).**

Plaintiffs argue that equity should play a role, citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (equitable tolling and estoppel apply to suits against United States). According to Plaintiffs, the Government knew of their potential claim, told them of their potential claim through the O'Leary press conference, set up a telephone hotline for victims to call, and responded to victims when they did call. The essential purposes behind the claim requirement are notice to the Government of an injury and notice of the amount sought in damages. According to Plaintiffs, if the Government is already aware of an injury, a claim serves no useful function.

The position has some attraction, but *Irwin* held that the *same* tolling principles that govern private actions apply to actions against the Government. 498 U.S. at 95-96. Under Plaintiffs' theory, a negligent driver could strike another vehicle, kill the occupants, know he was at fault, and expect to be sued. Because of his knowledge of fault and exposure, he would remain subject to suit into infinity. That is not the law. The driver would have to do something inequitable to the decedents' survivors to toll the statute; something that would reasonably lull them into believing the statute was being waived, or otherwise giving assurances that action need not be taken. *Millay v. Cam*, 135 Wash. 2d 193, 206 (1998) ("The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff"). The simple fact is that White was aware of injury and causation on January 11, 1994. Because he was so aware, the cause of action had accrued. *Kubrick, supra*, 444 U.S. at 119-22. He perfected his claim on August 26, 1996. Nothing the Government did during the intervening 2 ½ years prejudiced him, or dissuaded him from pursuing his own investigation, or turning the matter over to counsel. *See Goodhand v. United States*, 40 F.3d 209, 213 (7th Cir. 1994). Equitable tolling during this period is unavailable because nothing the Government did during this time frame was inequitable.

Plaintiffs point to the hotline and assert that this may be deemed an alternative mode of filing a claim. Unfortunately for Plaintiffs, the Court has previously rejected this argument with respect to Plaintiff McClellan.

> Neither the Amended Complaint nor Plaintiffs' response to the United States' motion provide any indication that McClellan has filed a written claim with DOE regarding his alleged injuries. Instead, McClellan contends he provided DOE with sufficient notice of his claim by calling a telephonic hotline set up by DOE in 1993 after then DOE Secretary O'Leary publicly announced the existence of government sponsored radiation experiments like those at issue in this action. This was insufficient to present this claim to DOE for settlement because it has long been established that § 2675 claims must be presented in writing. *Warren*, 724 F.2d at 780; *see also* 28 U.S.C. § 2401(b) (barring claims unless first presented "in writing" to appropriate agency).

Order entered March 17, 1998 at 4. **Ct. Rec. 168.**[4]

It could be argued, and Plaintiffs do, that holding out the bait of possible compensation would reasonably lull the listener into believing that the money was on its way. Initially, perhaps, but when 2 years passed with only empty hints of compensation, continuing to hold out the bait would have an opposite effect on a reasonable person. He would know by then that he had best pursue his own claim, because the Government was not going to carry through voluntarily.

Finally, there is room to question whether *Irwin*'s broad statement survives *United States v. Beggerly*, 118 S. Ct. 1862 (1998). *Beggerly* held that when a statute already provides a "knew or should have known" accrual standard, further equitable tolling is not available because the doctrine is built into the discovery rule. *Id.* at 1868. There is no federal statutory accrual rule in this case, but once an action has been found appropriate for application of the discovery rule, the same principle applies.[5] *See Kubrick, supra*, 444 U.S. at 120 n.7 (discussing "knew or should have known standard").

As to the 15 Plaintiffs who were allowed to join in the action by Order of November 6, 1997 (**Ct. Rec. 148**), they did not file an administrative claim until May 26, 1998. **Ct. Rec. 181, Ex. 5, Attachment A.** That was almost 7 months after they were allowed to join as Plaintiffs, and more than 8 months after the United States substituted for its former AEC employees, Totter and Liverman, pursuant to 28 U.S.C. § 2179(d)(1). **Ct. Rec. 107.** This is not permitted. A claim must be filed *before* an action is commenced. *McNeil v. United States*, 508 U.S. 106, 111-13 (1993); *Crowley Marine*

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[4]This ruling is not, as the Government argues, collateral estoppel, but it is the law of the case.

[5]*Beggerly* was also influenced by the "unusually generous" 12-year period provided by the statute at issue, and by the desirability of ensuring that landowners know where they stand on their property rights. 118 S. Ct. at 1868. Neither feature is present here.

*Servs., Inc. v. Fednav Ltd.*, 924 F. Supp. 1030, 1035 (E.D. Wash. 1995). The same rule applies even when the United States substitutes for named defendants, as it did in this case. *Sullivan v. United States*, 21 F.3d 198, 206 (7th Cir. 1994).[6] This Court does not now have subject matter jurisdiction with respect to the "new" Plaintiffs' claims against the United States, and never did.

Plaintiffs counter that the Class Action Complaint was itself sufficient to constitute a "claim." The position is flawed for several reasons. First, White is not a class representative. He may never be. He is a proposed representative of a putative class that has not yet been certified pursuant to Rule 23(c), and may never be. The notice imparted by White did not impart notice on behalf of members of the uncertified class. Second, the "claim" was not made to the agency. The agency is not even named. Third, the "claim" is not for a sum certain.

Plaintiffs contend this is an idle exercise because 6 months have now run since the administrative claims were filed, and the 15 newcomers have now exhausted. They urge that all they need do is move to rejoin, or commence a new action. There is a body of case law holding that rejoining will not work because a claim must be administratively exhausted at the time the action is commenced. *Sparrow v. United States Postal Serv.*, 825 F. Supp. 252, 254-55 (E.D. Cal. 1993). If Plaintiffs take this approach, the Government will wait until the 6-month statute of limitations runs, and move to dismiss again. 28 U.S.C. § 2401(b). Plaintiffs can commence a new action, but instead of relying on exhaustion of the May 26, 1998 claims, they might be better off seeking to apply 28 U.S.C. § 2679(d)(5) to argue an earlier filing date on the claim.

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[6]This rule obviously raises timeliness issues, but Congress provided for that. When the United States enters a substitution, and a plaintiff must file an administrative claim, the claim will be deemed timely if: (1) the claim would have been timely if filed on the date the suit was commenced; and (2) the claim is presented to the proper agency within 60 days after dismissal of the civil action. 28 U.S.C. § 2679(d)(5).

**B. Conte's Motion for Summary Judgment re: Statute of Limitations (Ct. Rec. 180) (joined in by all Defendants except Totter, Liverman, and the Government); Totter and Livermans's Motion for Summary Judgment on Statute of Limitations (Ct. Rec. 189)**

These motions seek to dispose of the federal civil rights claims and all state claims on limitations grounds. The motions may be treated together because Washington law and federal common law parallel one another on accrual issues.[7] With respect to the state claims, state law provides the entire answer. *General Bedding Corp. v. Echevarria,* 947 F.2d 1395, 1397 n.2 (9th Cir. 1991). With respect to the federal claims, state law provides only the relevant statute. Federal law determines when accrual occurs. *Williams v. UNUM Life Ins. Co. of America,* 113 F.3d 1108, 1111(9th Cir. 1997). As indicated, there is no conflict in any event. The following principles govern.

**1. Rules of accrual**

When a federal cause of action does not contain its own statute of limitations, courts borrow the most analogous state limitations period. *Wilson v. Garcia*, 471 U.S. 261, 266-68 (1985). In a civil rights case, that is the personal injury statute. *Id.* at 275. In Washington, the period is three years. RCW § 4.16.080(2). *Rose v. Rinaldi*, 654 F.2d 546, 547 (9th Cir. 1981). The same principles apply to the judicially-created *Bivens* action. *Van Strum v. Lawn*, 940 F.2d 406, 408-10 (9th Cir. 1991). As to the state

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[7]For reasons to be addressed further, reference to Washington law may be superfluous to some extent because just as Plaintiffs failed to comply with federal exhaustion requirements, so they failed to comply with state exhaustion requirements. Be that as it may, the statute of limitations issues are in the case, and will be addressed despite the fact that the state law claims asserted against state officials may become irrelevant due to the mode of disposition. Moreover, the limitations issues remain relevant so far as GE and Battelle are concerned, neither of whom are covered by the exhaustion requirement.

claims, the same personal injury statute applies to all causes of action asserted, save for the battery claim which is governed by the 2-year statute. RCW § 4.16.100.

A cause of action presumptively accrues when the injury occurs. *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984); *accord, Williams, supra,* 113 F.3d at 1111; *Estates of Hibbard*, 118 Wash. 2d 737, 744 (1992). When causation is hazy, the general rule is modified to require knowledge of the injury and its immediate cause. *Dyniewicz, supra*, 742 F.2d at 486; *Hibbard, supra*, 118 Wash. 2d at 744. Known as the "discovery" or "due diligence" rule, there is some flexibility in cases where an injury or its cause is unknown and unknowable through reasonable diligence. *See In re Swine Flu Prod. Liability Litig.*, 764 F.2d 637, 639-40 (9th Cir. 1985); *White v. Johns-Manville*, 103 Wash. 2d 344, 354-56 (1985). The focus is on facts going to the presence of an injury and its relationship to an act, rather than on whether a theory of recovery exists. *Herrera-Diaz v. United States Dept. of Navy*, 845 F.2d 1534, 1536 (9th Cir. 1988); *Allen v. State,* 118 Wash. 2d 753, 758 (1992); *Gevaart v. Metco Constr.*, 111 Wash. 2d 499, 502 (1988). The parties agree that the test is objective, and is based on what a reasonable person similarly situated would perceive, and what inquiries a reasonable person would make.

**2. Fraudulent concealment**

An exception to the general rules comes into play when the party sought to be held liable engages in fraudulent conduct preventing the victim from discovering his claim, despite the exercise of due diligence. *Federal Election Comm'n v. Wilson*, 104 F.3d 237, 241 (9th Cir. 1996); *Crisman v. Crisman*, 85 Wash. App. 15, 20-21 (1997). The presence of fraud may operate in two different manners. It may toll the limitations period after a claim has accrued, or it may operate to keep the claim from accruing because a victim is unable to uncover critical facts even applying due diligence. Plaintiffs are

proceeding on the latter theory.[8]

Every Plaintiff contends that Paulsen minimized the effects of radiation. Many stated they were told it would be akin to having several chest x-rays. **Ct. Rec. 199, Ex. 1 at 71; Ex. 2 at 40; Ex. 4 at 53; Ex. 5 at 30, 89; Ex. 6 at 77; Ex. 9 at 73; Ex. 10 at 16, 148; Ex. 11 at 42, 83; Ex. 12 at 43-44.** The procedure was safe. ***Id.*, Ex. 3 at 102; Ex. 6 at 78; Ex. 9 at 73.** "We received assurance after assurance after assurance that it was totally safe." ***Id.*, Ex. 7 at 110.** There would be no lasting effects. ***Id.*, Ex. 1 at 85.** The participants would receive about as much radiation as would an astronaut in circling the globe. ***Id.*, Ex. 4 at 53.** The purpose of the experiment was to determine safe levels of exposure for astronauts. ***Id.*, Ex. 5 at 75.**

These representations are at odds with Plaintiffs' understanding that they risked mutation of their genes. They were aware that a vasectomy would be required to guard against fathering deformed children. ***Id.*, Ex. 1 at 71-72; Ex. 9 at 80-81; Ex. 11 at 36.** Summary judgment proceedings, however, are not the place to resolve such conflicts. Plaintiffs have created genuine issues of material fact over whether Paulsen vastly understated the magnitude of their exposure. According to Plaintiffs, White's 400 rad dose is the equivalent of 60,000 chest x-rays.

Those are the initial misrepresentations complained of. Plaintiffs contend, however, that an ensuing cover-up rendered it difficult, if not impossible, to develop the critical facts they would need to know to ascertain their injury and its cause. They have ample assistance from no less an authority than former-Secretary O'Leary.

> Q. . . . Prior to December 7, 1993, the date of your press conference, could Rob White have procured information from the Department of Energy sufficient to put him on notice that he had claims arising out of the Paulsen experiments?
>
> A. I do not believe he could have.

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[8]This latter theory is codified in Washington at RCW § 4.16.080(4) and is applicable to Plaintiffs' state law claims.

**Ct. Rec. 199, Ex. 84 at 72.**[9]

O'Leary's opinion was based in part on an entrenched policy at DOE of ignoring or delaying FOIA requests. The average FOIA request required 1,000 days to process, "some of them, running into 3,000 days." ***Id.* at 42.** Information that might be embarrassing "was simply not made available." ***Id.*** "I might add that the department had a culture of punishing people when it -- when they delivered bad information." ***Id.*** By "bad information," O'Leary did not mean inaccurate information, but rather information that might place the agency in a bad light.

Plaintiffs claim that the experience of Plaintiff Byers is illustrative of their dilemma in discovering injury and causation. He went to a doctor and asked whether his 300 rad dose could be responsible for his complaints. The doctor dismissed him out of hand, stating that what Byers was telling him was not humanly possible. ***Id.*, Ex. 15 at 103.** In the physician's view, Byers actually received .3 rad, or more likely .03 rad, but certainly not 300 rads. ***Id.***

**a. Liverman and Totter**

The federal defendants had no personal hands-on management role in the Paulsen study, once underway. **Ct. Rec. 193.** AEC field representatives reviewed progress, but the role of these upper level officials was only to approve funding. Liverman is in a particularly favored position because he voted against the Heller project that is the subject of *Bibeau, supra*. ***Id.*** Liverman did not believe in using humans in experiments of this nature. This is consistent with his deposition testimony that "Human experimentation for experimentation's sake is not any good." **Ct. Rec. 199, Ex. 55 at 72.** Liverman has no independent recollection of the Paulsen study, but is certain he

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[9]O'Leary was probably well within her area of expertise in providing this answer. She goes a little beyond her area of expertise in opining that in her view, the inmates participating in the Paulsen project were not capable of giving informed consent. **Ct. Rec. 199, Ex. 84 at 57–58, 69.**

would have voted against it for the same reason he voted against the Heller project. **Ct. Rec. 193.** Both defendants have been deposed, and there is nothing in the record refuting these assertions.

Even assuming that these Defendants "must have known something" as a result of one or more briefing sessions, fraudulent concealment requires active, not passive, concealment. *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987). Simply not "owning up" is insufficient. *Grimmett v. Brown*, 75 F.3d 506, 515 (9th Cir. 1996). The only way Plaintiffs can save the day with respect to these Defendants is by resort to a conspiracy theory. The record fails to establish such a conspiracy with respect to these Defendants. Unlike several other Defendants, they had no special relationship with Plaintiffs that would impose a heightened duty, and they undertook no affirmative action beyond initial authorization of the project. Defendants' motion is granted.[10]

**b. Everyone else**

Plaintiffs make the argument throughout their briefing that Paulsen, Rhay, and Conte stood in a fiducial relationship with Plaintiffs. It is difficult to think of a nontreating medical researcher employing non-therapeutic techniques to human guinea pigs as being in a fiducial setting. It is more difficult to see the warden/inmate relationship as engendering the sort of trust and confidence that tends to characterize fiducial relationships. Nonetheless, it appears that such may be the case, or at least, issues of fact remain.

**i. Paulsen**

Paulsen believes he had exactly the same duty of obtaining informed consent as he

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[10]The *agency* did much more than fail to "own up." Former-Secretary O'Leary felt the lack of cooperation in providing information to the public rose to the level of repression, and that the practice was systemic. The issue, however, is what these two *Bivens* Defendants did. On this record, it appears that at most, they did not "own up."

would were he treating a regular patient on the outside. He was not obtaining consent forms to protect himself from legal liability, but because "My duty to the volunteer was the same as my duty to a patient on the outside or anything else. I had to inform them." **Ct. Rec. 199, Ex. 24 at 142.** Paulsen believed he had a physician/patient relationship with the inmates while he was attending to their biopsies. ***Id.* at 117.** At least one of the Plaintiffs (Donovan) believed that Paulsen was his doctor. ***Id.*, Ex. 3 at 183.** Paulsen believed that when White came to see him after being released from prison, it was in the context of a physician/patient relationship. ***Id.*, Ex. 24 at 123.**

The significance of the physician/patient relationship is that the full panoply of fiducial duties attaches. *Carson v. Fine,* 123 Wash. 2d 206, 218 (1994). The significance of the fiducial relationship is that Paulsen would not be privileged to lay back and say nothing. He would have to "own up." *Crisman, supra*, 85 Wash. App. at 22. Material issues of fact remain with respect to this Defendant's representations.

**ii. Prison officials**

More unusual is the theory that DOI Director Conte and WSP Superintendent Rhay were fiduciaries, but relationships giving rise to special duties of care are not confined to the typical attorney/client, trustee/beneficiary, patient/physician constructs. A "special relationship" may arise when one party undertakes affirmative obligations running to another; *e.g.*, innkeeper/guest, school/student, employer/employee, hospital/patient, carrier/passenger, business establishment/customer. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash. 2d 217, 227-28 (1991). These relationships are all characterized by the common thread of being "protective in nature." *Id.* A "special relationship exists between the actor and the other [when it] gives the other a right to protection." *Petersen v. State,* 100 Wash. 2d 421, 426 (1983) (quoting with approval Restatement (Second) of Torts § 315).

*Hutchins* does not address fiduciaries, but rather one's duty to protect others from harm caused by third parties. A "special relationship" within the meaning of *Hutchins*

does not concurrently implicate the full spectrum of fiduciary obligations, but the decision's third-party-harm analysis is very much on point. Given the duties imposed by statute on prison officials, and the realities of prison life, it may not be unreasonable to add warden/inmate to the list of special relationships.

**iii. GE's Motion for Summary Judgment**

GE advances its central argument for the first time in the reply. Ordinarily, this would not be fair because it avoids the adversarial process. However, GE stands in a posture of its own, and its position is a natural outgrowth of Plaintiffs' argument that even innocent parties may be held accountable for fraud committed by others, provided that agency or privity exists. What Plaintiffs are really arguing, of course, is co-conspirator liability. The Court previously dismissed the state law fraud claim asserted against GE for failure to allege the requisite elements with particularity. The Court went on to note that "This flaw in Plaintiffs' pleading is not remedied by Plaintiffs' allegations that Defendant was involved in a conspiracy with other Defendants who engaged in fraudulent conduct because Plaintiffs fail to allege sufficient facts to establish that an object of this conspiracy was the commission of fraud." Order entered March 4, 1998 at 2. **Ct. Rec. 166.** Plaintiffs were offered the opportunity to amend and did not do so. This ruling, now the law of the case, has a spillover effect on the statute of limitations issue. If GE cannot be charged with fraud, or with conspiracy to commit fraud, then neither can it be charged with fraudulent concealment of critical facts. At the hearing, the Court sua sponte invited Plaintiffs to file a sur-reply. They have done so, and the submission does not alter this conclusion.

**iv. Battelle's Motion for Summary Judgment**

Battelle, as successor to GE, attempts to bootstrap on to GE's argument. The distinguishing feature is that GE has the benefit of a prior order of dismissal, and Battelle does not. In essence, Battelle's argument is an original motion to dismiss for lack of pleading particularity. As with GE, the Court sua sponte invited Plaintiffs to respond,

and they have done so.

The mechanical aspects of Battelle's participation are stated somewhat more broadly in the Amended Complaint than are those directed to GE, but the section addressing conspiracy treats the two entities precisely the same. **Ct. Rec. 25, ¶¶ 93-99.** If neither fraud nor conspiracy to commit fraud has been stated with sufficient particularity to meet pleading standards, then it would appear that Battelle is entitled to the benefit of the GE ruling.

**3. The categorical approach (or, how could they not know?)**

With accrual issues settled, the next question is the validity of the categorical approach taken by *Bibeau, supra.* If a court must look at each Plaintiff individually, his particular circumstances, and the nature and severity of his medical complaints, much of this case must go forward. With several exceptions, Defendants do not attempt to particularize the Plaintiffs, but lump them together in arguing what "they" must have known. The approach is not altogether meritless. For example, when the Three Mile Island nuclear accident resulted in literally thousands of claims, the Third Circuit had little difficulty concluding that the accident and the dangers of radiation were so well entrenched in the public mind that no one could fail to appreciate the source of an injury linked to radiation. *In re TMI*, 89 F.3d 1106, 1117-18 (3rd Cir. 1996). In like manner, *Bibeau, supra,* held that the "plethora of information in the public domain regarding the risks of radiation exposure, generally, and the Heller experiments, specifically" conveyed notice to plaintiff as a matter of law. 980 F. Supp. at 355; *see also, Winters v. Diamond Shamrock Chem. Co.,* 149 F.3d 387, 403-04 (5th Cir. 1998) (pervasive news accounts of Agent Orange injuries imputed notice to public at large).

Defendants have identified 55 news articles addressing the Paulsen study, published in both the local and national press between 1963 and 1987.[11] **Ct. Rec. 181,**

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[11]The Paulsen study was never "secret" in the sense that no one knew of its existence. The fact of its existence was not classified. Hence, the large number of

**¶ 19 & Attachment, Exs. 1-55.** In March 1976, then-Governor Evans launched a well-publicized probe into the practice of using prisoners as guinea pigs. ***Id.*, Exs. 15, 16, 18.** Congress became involved, and in 1986 issued what is known as the "Markey Report," a congressional report condemning the use of humans in 31 different radiation experiments. ***Id.*, Ex, Q.** In November 1984, Peter Jennings' ABC World News Tonight ran an expose on national television. ***Id.*, Ex. 32.** It is a wonder that anyone over the age of 12 from any walk of life could have avoided learning of the experiments, or learning of the dangers associated with radiation. It goes beyond wonder to suppose that a former inmate who actually participated in the trials and suffered residuals could have successfully avoided coming into that knowledge.

Having said that much, research has not disclosed any Ninth Circuit decision adopting the view that general public awareness is itself sufficient to constitute constructive notice to every citizen. One decision has been found, which declined that view. *Swine Flu, supra*, 764 F.2d 637. Swine flue vaccine proved to be more deadly than the disease, and inoculations ceased abruptly amid widespread press coverage. The regional press in the area of plaintiff's residence ran the story. *Id.* at 640. One might think that a person who had just been inoculated less than a week before the story broke, as plaintiff was, would naturally react to the news with anxiety, and would probably relay her fears to her husband. The Court agreed that "general community awareness" might be relevant to imputing individual knowledge, but absent reason to believe that the victim's "immediate community" was exposed to publicity, the Court thought additional fact-finding was necessary. *Id.* at 640-41.

Then too, Defendants have a factual problem with their contention that publicity was so pervasive that no one could fail to be aware. A number of defense witnesses had

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news stories generated over the years. What Plaintiffs complain of is that although the project was known to be in operation, no information was available that would suggest they had been drawn into participation through fraudulent representations.

little or no awareness of the publicity either. Defendant Totter did not recall having ever read a newspaper account of the Paulsen study. **Ct. Rec. 199, Ex. 50 at 105-06.** He was not familiar with Congressman Markey's inquiry. ***Id.* at 118.** He was not aware of the 1976 Heller litigation in Oregon. ***Id.*, Ex. 78 at 139-40.** Defendant Liverman was not aware of newspaper articles covering the Paulsen project until 1995 when the President issued his directive in response to the O'Leary press conference that all relevant materials be gathered and preserved. ***Id.*, Ex. 55 at 69-70.** Defendant Battelle's Ronald Paul had not seen any news articles either. ***Id.*, Ex. 46 at 62.** Battelle's Kenneth Swinth had not seen any articles prior to the O'Leary press conference. ***Id.*, Ex. 31 at 94-95.** As to the Markey Report, Plaintiffs believe it was deliberately suppressed by DOE. So does former-Secretary O'Leary. ***Id.*, Ex. 84 at 66-67.** Plaintiffs believe the report is being misused today by DOE contractors embroiled in litigation of this nature. So does Congressman Markey. ***Id.*, Ex. 89.**

Given *Swine Flu*, the fact that defense witnesses with an interest in the matter were unaware of the publicity, and the general rule that the jury decides accrual questions (*Lundy v. Union Carbide Corp*, 695 F.2d 394, 397-98 (9th Cir. 1982)), questions of fact remain on the import of the publicity.

**4. Individual approach**

Summary judgment is arguably appropriate as to some Plaintiffs. Plaintiff Bryant, for instance, made the connection between the radiation and his testicular disorders as early as 1976, when he sought out Dr. Paulsen on his attorney's advice. **Ct. Rec. 181, Ex. M.** Dr. Paulsen did not confirm the connection and, in fact, implicitly denied there was any, but the point is that Plaintiff made the connection, stated an intention to seek out another medical opinion, and was there at the behest of his attorney. ***Id.***

Plaintiff Stowell learned in the mid-1970's of similar litigation in Oregon. ***Id.*, Attachment (Stowell Dep. at 47).** He sought out an attorney, but could not afford the $10,000 retainer fee requested. ***Id.* at 48-49.**

Plaintiff Fraulini learned sometime in the late-1960's or early-1970's that he had a potentially cancerous growth on one of his testes, but did not return to the doctor who found it for fear of confirming that he did, in fact, have cancer. ***Id.*, Attachment (Fraulini Dep. at 43-44)**. Fraulini was aware of news media accounts of the connection between radiation and cancer. ***Id.* at 33, 55-57**. He later followed up by writing letters in 1987 to the governor and to his congressman. ***Id.*, Ex. R**.

Plaintiff Shepherd made the connection. After describing a rash on his inner thighs which developed 20 years earlier, he was asked whether he associated the rash with his participation in the radiation experiment. ***Id.*, Attachment (Shepherd Dep. at 51)**. "Yeah, I figured it could have something to do with it." ***Id.*** Asked to expand, he replied "Well, the radiation probably damaged some kind of cells in there or something." ***Id.*** He made this connection 20 years ago, but dismissed it when the rash finally disappeared 5 years ago. ***Id.***

Beyond these four plaintiffs, Defendants do not meet their preliminary burden of showing a lack of genuine issue of material fact. The one exception is the battery claim which is governed by the 2-year statute. White was aware of his claim no later than January 11, 1994, and this action was not commenced until December 6, 1996. As to the other Plaintiffs, because Defendants have rested on their group theory, it is impossible to say if their claims are time-barred. Some Plaintiffs claim not to have known of causation until solicited for inclusion in this lawsuit.

Coming back to the four Plaintiffs who, arguably, are subject to summary judgment, the question is close. The Court could grant the motion, and it would probably be sustained on appeal. However, it will not be granted at this time for five reasons.

a. In pursuing their group theory, Defendants mention only Fraulini and Stowell. Information pertaining to Bryant and Shepherd was developed by the Court in its independent research. A ruling adverse to these two Plaintiffs would fall outside the adversarial process.

b. Plaintiffs have powerful evidence of a deliberative, systemic coverup by DOE over the span of many years.

c. As late as 1976, Paulsen was still telling his patients "No problem." He had to have known that others, including DOI, saw very significant problems. That is why he was shut down 5 years earlier.

d. Whether Plaintiffs could have gone into the medical community and developed meaningful information is less than certain. Illustrative is Plaintiff Byers' experience when he disclosed his 300 rad dose, only to be told he was "crazy." According to the physician, it simply could not have happened.

e. This case is going forward, and the incremental cost of carrying these four Plaintiffs will be marginal. Denial will be without prejudice to bringing a renewed motion once this case ages.

In summary, defense motions on the statute of limitations issues will be: (1) granted as to the federal Defendants; (2) granted as to all Defendants on the battery claim asserted by White; and (3) denied in all other respects.

**C. State Defendants' Motion for Partial Summary Judgment on State Law Claims**[12]

There is a threshold issue that cannot be resolved on this record. Plaintiffs contend that because discovery was limited by stipulation to statute of limitations and qualified immunity issues, this motion is improper. Defendants do not address Plaintiffs' assertion that they are in breach of the stipulation. Because the stipulation is not cited, the Court cannot determine where the truth lies. Even if Plaintiffs are correct, it is difficult to see how they are prejudiced. This issue is not fact-driven, and merely presents legal questions as to what the undisputed facts mean.

Pursuant to RCW §§ 4.92.100-.110, claims against the state must be

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[12]Defendants recognize that a state's nonclaim statute cannot bar the federal causes of action.

administratively exhausted by filing with the Office of Risk Management prior to bringing suit. While the statutes refer only to the state, "claims against the state" include those arising out of the conduct of the state's officers, agents, and employees acting within the scope of their duties. *See Hardesty v. Stenchever*, 82 Wash. App. 253, 260-61 (1996). After 60 days have elapsed, the claimant may then commence an action. The statute counsels that it is to be liberally construed when reviewing the content of a claim, but Washington courts have strictly construed the procedural requirements. *See, e.g., Kleyer v. Harborview Med. Center*, 76 Wash. App. 542, 547-49 (1995) (filing claim with affected agency insufficient; claim must be filed with Office of Risk Management in Olympia); *see generally, Hardesty, supra*, 82 Wash. App. at 259 (arraying authorities). A failure to wait the required 60 days is fatal to maintaining an action. *Schmitz v. State,* 68 Wash. App. 486, 489-91 (1993). This is so even if the complaint and summons is not served until 60 days have elapsed. *Id.*

A claim was filed in this case. Defendants contend it is defective in the following particulars: (1) it was filed with the Office of Risk Management the same day this action was commenced; and (2) only White filed the claim, although he purported to do so on behalf of the class. Plaintiffs counter that: (1) when suit was initially filed, Defendants were named in only their individual capacities; and (2) Defendants were acting outside the scope of their authority.

**1. Timeliness**

A claim filed the same day an action is commenced is untimely. *Schmitz, supra,* 68 Wash. App. at 489-91 (1993). The remedy is dismissal. *Id.*

**2. Filing on behalf of class**

Plaintiffs point to authority from other jurisdictions allowing this practice. This authority is not persuasive to this Court in construing state law. The verification requirement found in RCW § 4.92.100 counsels against allowing an individual to file on behalf of others, at least unless he has authority and first-hand knowledge of the claims

of the others. The issue is of little moment because even if White validly filed on behalf of the class, all that means is that the entire class is out of compliance with the statutory timing requirements.

**3. Individual capacities**

Plaintiffs initially filed against the state Defendants only in their individual capacities, filing an administrative claim the same day.[13] After 60 days elapsed, they amended the complaint to allege an official capacity claim as well. Individual versus official capacity has almost mystical meaning in the federal system, particularly in civil rights litigation. *See Hafer v. Melo*, 502 U.S. 21, 25-26 (1991). The distinction has less significance in the state system. The critical inquiry for purposes of the nonclaim statute is whether the actor is entitled to defense and indemnification from the state pursuant to RCW §§ 4.92.070-.075. That is all the legislature was interested in when waiving sovereign immunity.

Plaintiffs urge that RCW § 4.92.110 does not apply to a suit against a state employee named in his individual capacity. *Jones v. University of Washington*, 62 Wash. App. 653, 664 (1991). If the state is not going to pay for the defense and any resulting judgment, the state has no interest in an administrative claim. *See Hardesty, supra*, 82 Wash. App. 253 at 261. However, the Court has no more authority to order the State of Washington not to provide defense and indemnification than it would to order to the contrary. It is mere pleading formality to tell the state that the claim is based on dual capacities, but tell the Court that it is being made only against Defendants in their individual capacities. It would gut the nonclaim scheme to construe this sort of pleading so as to avoid the statute. It would also contravene the statutory mandate that "no action

---

[13]Which, interestingly enough, states: "each tortious act attributed in the Class Action Complaint to a state agent and/or employee in his individual capacity was committed by such person and such person's state employer in his and/or its official capacity." **Ct. Rec. 189, Attachment.**

shall be *commenced*" until 60 days have elapsed from the filing of an administrative claim. RCW § 4.92.110. Plaintiffs' tact would not work under the FTCA. *Sparrow, supra*, 825 F. Supp. at 254-55. There is no reason to believe the legislature intended that it work under the state's analog to the FTCA.

This might be a different case if Plaintiffs disclaimed any interest in satisfying a judgment from the state coffers. In that event, this would be a true "individual capacity" action. *Jones, supra*, 62 Wash. App. at 664. As matters stand, however, the Court does not understand that to be Plaintiffs' position. When a state waives its sovereign immunity, it is a matter of no small import. When a state imposes minimal procedural requirements as a condition precedent of waiving immunity, it is no great burden. The Court is confident that the state courts would reject the argument of Plaintiffs as does this Court.

**4. Scope of authority**

Plaintiffs allege repetitively in the Amended Complaint that Defendants did what they did because of their position, but now claim they were off on a lark of their own because of the intentional nature of the torts alleged. There is no question but that each Defendant was acting within the scope of employment. Each was doing what he was doing with the knowledge of supervisors and the blessing of the employing agency. Each was able to do what he was doing only because of his position of employment.

In summary, the motion will be granted for failure to comply with Washington's nonclaim statute. Dismissal of the state claims is without prejudice.

**D. State Defendants' Motion for Partial Summary Judgment on Qualified Immunity (Ct. Rec. 184); Liverman's Motion for Summary Judgment on Qualified Immunity (Ct. Rec. 191)**[14]

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[14]The motions are treated together because Washington State law and federal law parallel one another on qualified immunity issues. Washington has more statutory sources of immunity than does the federal system, but none are relevant here.

These motions are significant, but the least important of those presented. Liverman's is overkill, given the ruling on his other summary judgment motion. As to the State Defendants' motion, having determined that issues of fraudulent concealment preclude summary judgment, qualified immunity cannot save Defendants because good faith and intentional fraud are mutually exclusive. *See by analogy, Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) ("Given the district court's determination that there is a triable issue as to deliberate indifference, the doctors were not entitled to summary judgment on the ground that they could reasonably have believed their conduct did not violate clearly-established law"); *see also, Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992). *But see, Osolinski v. Kane*, 92 F.3d 934, 937 (9th Cir. 1996). These decisions are Eighth Amendment cases, but the mutual exclusivity of good faith and subjective bad intent need not be so narrowly confined. An actor engaging in subjective bad conduct will generally be hard pressed to demonstrate that his acts were nonetheless objectively reasonable.

Three elements must be established to invoke qualified immunity: (1) the right asserted must be identified; (2) the right must have been clearly established when the wrongful acts occurred; and (3) a reasonable official could not have believed his acts were lawful. *Hamilton, supra*, 981 F.2d at 1066. The Washington approach is essentially identical. *Robinson v. City of Seattle*, 119 Wash. 2d 34, 64-66 (1992). Among the rights allegedly infringed was the right to be free from non-consensual medical experimentation that results in health risk and pain. *Stadt v. University of Rochester*, 921 F. Supp. 1023, 1027-28 (W.D. N.Y. 1996).[15] According to *Stadt*, that

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[15]This is, of course, not the *Stadt* case, where plaintiff was injected with radioactive materials without her knowledge and then studied over the next 26 years. Plaintiffs here volunteered, knowing they would be subjected to irradiation, knowing they would face multiple biopsies, knowing that irradiation could produce mutant sperm, and knowing that this is why they would be required to undergo a vasectomy. However,

right was clearly established "well before 1946." *Id.* The more difficult question is whether a reasonable person in Defendants' position could have believed their actions to be lawful.

According to Paulsen, there was no opposition in the United States to the use of inmates as guinea pigs in 1963. The only opposition he got from DOI personnel was from Dr. Holliday, who was ultimately successful in shutting the project down. The events of the relevant time frame cannot be ignored. In the not-too-far-gone past, the United States stood on the brink of WW III while the Russians decided just how important it was to have long range nuclear missiles on Cuban soil. It was the cold war at its chilliest, when assured mutual destruction appeared to be mankind's best bet for continued survival. In the interest of saving hundreds of millions of innocents around the world, perhaps it is not surprising that the lives of those not so innocent might be deemed a little cheaper.

Even in this historical context, it cannot be said as a matter of law that Defendants enjoy qualified immunity based on this third prong. It is not a matter of law at all, but of moral perception. The record will require substantial development to determine if what was going through Defendants' minds at this time could have reasonably gone through the minds of those similarly situated.[16]

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they also "knew" that their risks would be about the same as that created by "one or two chest x-rays." The distinction between *Stadt* and this case is a matter of degree (and rather significant degree), but not substance.

[16]Plaintiffs contend the issue need not be decided at all with respect to Paulsen because, as an independent contractor, he is not entitled to the defense of qualified immunity, citing, *Richardson v. McKnight*, 521 U.S. 399 (1997). Plaintiffs must know something that did not find its way into the briefing. Paulsen was not a DOI or WSP employee, but he was employed by UW as a member of the faculty. UW is an arm of the state.

**E. White's Motion for Leave to File Corrected Response**

The motion is not opposed.

Accordingly, **IT IS HEREBY ORDERED:**

1. The Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Ct. Rec. 178) is **GRANTED**. Dismissal as to White is with prejudice, and as to the 15 "new" defendants, without prejudice.

2. Defendant Conte's Motion for Summary Judgment re: Statute of Limitations (Ct. Rec. 180) is **GRANTED** as to the battery claim asserted by White, and **DENIED** in all other respects.

3. The State Defendants' Motion for Partial Summary Judgment on State Law Claims (Ct. Rec. 182) is **GRANTED**. Dismissal is without prejudice.

4. The State Defendants' Motion for Partial Summary Judgment on Qualified Immunity (Ct. Rec. 184) is **DENIED**.

5. Defendants Totter's and Liverman's Motion for Summary Judgment on Statute of Limitations (Ct. Rec. 189) is **GRANTED**.

6. Defendants Totter's and Liverman's Motion for Summary Judgment on Qualified Immunity (Ct. Rec. 191) is **DENIED**.

7. Plaintiff White's Motion for Leave to File Corrected Response (Ct. Rec. 202) is **GRANTED**.

8. There being no just reason for delay, the District Court Executive is directed to enter Judgment in favor of the United States on Plaintiffs' FTCA claim. FRCP 54(b).

9. Within 30 days from entry of this Order, the parties shall file a joint status certificate addressing all points of interest in moving this matter toward a schedule.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter

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this order and to furnish copies to counsel.

**DATED** this 20 day of January, 1999.

ROBERT H. WHALEY
United States District Judge

EXHIBIT B

# CIVIL APPEALS DOCKETING STATEMENT

DOCKET

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
CIVIL APPEALS DOCKETING STATEMENT

INTERNAL USE ONLY

PLEASE TYPE OR PRINT. ATTACH ADDITIONAL PAGES IF NECESSARY.

TITLE IN FULL: see attached for full caption

ROBERT E. WHITE, et al.,
Plaintiffs,

vs.

DR. C. ALVIN PAULSEN, et al.,
Defendants.

DON BYERS, et al.,
Plaintiffs,

vs.

C. ALVIN PAULSEN, M.D.,
Defendant.

DISTRICT: EASTERN/WA JUDGE: JUDGE ROBERT WHALEY

DATE COMPLAINT FILED:

DISTRICT COURT DOCKET NUMBER: CS-97-0239RHW CONSOLIDATED

DATE NOTICE OF APPEAL FILED: 2/19/99

IS THIS A CROSS-APPEAL? ___ YES XX NO

HAS THIS MATTER BEEN BEFORE THIS COURT PREVIOUSLY? ___ YES XX NO

IF YES, STATE WHEN:

CASE NAME:

CITATION: DOCKET NUMBER:

CHECK AS MANY AS APPLY

| JURISDICTION | | DISTRICT COURT DISPOSITION | | |
|---|---|---|---|---|
| 1. FEDERAL | 2. APPELLATE | 1. STAGE OF PROCEEDINGS | 2. TYPE OF JUDGMENT/ ORDER APPEALED | 3. RELIEF |
| [X] FEDERAL QUESTION | [ ] FINAL DECISION OF DISTRICT COURT | [X] PRE-TRIAL | [ ] DEFAULT JUDGMENT | [ ] DAMAGES: |
| [ ] DIVERSITY | [X] INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT | [ ] DURING TRIAL | [ ] JUDGMENT/ COURT DECISION | AMOUNT SOUGHT: |
| [ ] OTHER (SPECIFY): | [ ] INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY): | [ ] AFTER TRIAL | [ ] DISMISSAL/ JURISDICTION | [ ] AMOUNT GRANTED: |
| | [ ] OTHER (SPECIFY): | | [ ] JUDGMENT/ JURY VERDICT | [ ] AMOUNT DENIED: |
| | | | [ ] DISMISSAL/ MERITS | |
| | | | [X] SUMMARY JUDGMENT | [ ] INJUNCTIONS |
| | | | [ ] JUDGMENT NOV | [ ] PRELIMINARY OR [ ] PERMANENT |
| | | | [ ] DECLARATORY JUDGMENT | [ ] GRANTED OR [ ] DENIED |
| | | | [ ] DIRECTED VERDICT | |
| | | | [ ] OTHER (SPECIFY): | |

BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW:

See attached.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

See attached.

**BASED ON YOUR PRESENT KNOWLEDGE:**

1. Does this appeal involve a question of first impression?
   ____ Yes __X__ No

2. Will the determination of this appeal turn on the interpretation or application of a particular case or statute?
   ____ Yes __X__ No If yes, provide:

   Case name/status: _____

   Citation: _____

   Docket Number, if unreported: _____

3. Is there any case now pending or about to be filed in this court or any other court administrative agency which:

   a) Arises from substantially the same case or controversy as this appeal?
      ____ Yes __X__ No

   b) Involves an issue that is substantially the same, similar or related to an issue in this appeal?
      ____ Yes __X__ No

      Case name: _____

      Citation: _____

      Court or agency: _____

      Docket number, if unreported: _____

4. Will this appeal involve a conflict of law within the Ninth Circuit? ____ Yes __X__ No
   Among circuits? ____ Yes __X__ No
   If yes, explain briefly:

**DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:**

____ Possibility of settlement;

____ Likelihood of a motion to expedite the appeal;

__X__ Multiple parties on either side for whom joint briefing is possible;

____ Likelihood of motions to intervene on appeal;

____ Likelihood of motions to file amicus briefs;

____ Likelihood of motions to stay appeal pending resolution of a related case. Identify case name, docket number and court or agency:

____ Other procedural complexities:

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I CERTIFY THAT A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SUBMITTED TO THE CLERK OF THE DISTRICT COURT OR THE CLERK OF THE U.S. COURT OF APPEALS, AND THAT IT WAS SERVED ON EACH PARTY/COUNSEL SHOWN ON THE ATTACHED SERVICE LIST.

SIGNATURE 2.17.99 DATE

REMEMBER TO ATTACH COPIES OF ORDER/JUDGMENT APPEALED FROM AND SERVICE LIST WITH TELEPHONE NUMBERS

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THE HONORABLE ROBERT WHALEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

| | |
|---|---|
| ROBERT E. WHITE and TERESA JANE WHITE, and Their Marital Community, and CHARLES V. MCCLELLAN, JR., on Their Own Behalf and as Representatives of Classes of Similarly Situated Persons,<br><br>Plaintiffs,<br><br>vs.<br><br>DR. C. ALVIN PAULSEN, in his individual and former official capacity; BATTELLE PACIFIC NORTHWEST LABORATORIES, a division of BATTELLE MEMORIAL INSTITUTE, INC., an Ohio Corporation; THE BOARD OF REGENTS OF AND THE UNIVERSITY OF WASHINGTON; THE UNIVERSITY OF WASHINGTON MEDICAL CENTER; DR. JOHN RANDOLPH TOTTER, in his individual capacity; DR. JAMES LESLIE LIVERMAN, in his individual capacity; ROBERT J. RHAY, in his individual and former official capacity; GARRETT HEYNS, in his individual and former official capacity; DR. WILLIAM J. BREMNER, in his individual and former official capacity; GENERAL ELECTRIC, CO.; DR. WILLIAM CONTE, in his individual and former official capacity; C.E. HEFFRON, in his individual and former official capacity,<br><br>Defendants. | CONSOLIDATED CASE<br><br>NO. CS-97-0239 RHW |
| DON BYERS. Airway Heights, Washington, and DON KREITZ, Spokane, Washington<br><br>Plaintiffs,<br><br>vs.<br><br>C. ALVIN PAULSEN, M.D., Seattle, Washington,<br><br>Defendant. | |

# ATTACHMENT TO
# CIVIL APPEALS DOCKETING STATEMENT

White v. Paulsen, et al.
United States District Court
Eastern District of Washington
Cause No. CS97-0239RHW

## Brief Description of Nature of Action and Result Below:

Plaintiffs assert claims under 42 U.S.C. §1983 for alleged constitutional violations in connection with a medical study in which they participated as human subjects. The appellants, who acted in their official capacity as employees of agencies of the State of Washington, moved for summary judgment based on their qualified immunity from suit. The trial court denied the motion.

## Issues to be Raised on Appeal:

Whether the trial court erroneously declined to hold that plaintiffs' claims are barred, as a matter of law, under the qualified immunity doctrine.

# SERVICE LIST

**White v. Paulsen, et al.**
**United States District Court**
**Eastern District of Washington**
**Cause No. CS97-0239RHW**

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The Honorable Robert H. Whaley

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
FEB 24 1999
JAMES R. LARSEN, CLERK
DEPUTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT E. WHITE, et al.,

Plaintiffs,

v.

DR. C. ALVIN PAULSEN, et al.,

Defendants.

DON BYERS, et al.,

Plaintiffs,

v.

C. ALVIN PAULSEN, M.D., et al.,

Defendants.

No. CS 97-0239 RHW

JOINT STATUS REPORT

The Plaintiffs and defendants Paulsen, Rhay and Conte ("Defendants"), through their respective counsel, hereby submit the following joint status report.

1. Status of Discovery and Estimated Completion Date. Discovery regarding statute of limitations and qualified immunity issues is complete. Plaintiffs believe that discovery regarding



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liability and damages issues is largely complete, except for discovery of expert witnesses, and that all discovery can be completed in 90 days. Defendants believe that discovery regarding liability and damages as to each of the plaintiffs will require no less than 180 days, and may include, in addition to expert witness discovery, discovery from treating physicians and other health care providers, as well as lay and expert discovery regarding the claims asserted by or on behalf of spouses and children of study participants.

2. Status of Pending Matters. There are no motions presently pending before the court. On or about February 18, 1999, Defendants filed and served a Notice of Appeal, which seeks review of this Court's denial of Defendants' motions for summary judgment on the grounds of their qualified immunity from suit. Defendants take the position that, under Behrens v. Pelletier, 516 U.S. 299 (1996), Mitchell v. Forsyth, 472 U.S. 511 (1985) and Chuman v. Wright, 960 F.2d 104 (9th Cir. 1992), the Court's interlocutory ruling on qualified immunity is immediately appealable as of right. Furthermore, Defendants contend that "the district court is automatically divested of jurisdiction to proceed with trial pending appeal" of its qualified immunity ruling. Chuman v. Wright, 960 F.2d at 105. Defendants therefore will immediately seek a stay of all proceedings pending resolution of the appeal.

3. Joinder of Additional Claims or Parties. Plaintiffs expect to file motions to amend their complaint to renew their state tort claims against the Defendants, and their claims against the United States, which the court recently dismissed for failure to comply with the state and federal tort claims acts. Plaintiffs contend that, as these claims were part of the litigation throughout discovery until the Court's recent order, the renewal of these claims will not prejudice the Defendants or require additional discovery that will unnecessarily delay the litigation. Defendants contend that because they have filed notices of appeal regarding the ruling on qualified immunity, this court may not address the addition of claims or parties until the appeal is resolved.

4. Trial Date. The parties believe that they can be ready for trial by 90 days after the close of discovery.



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5. Jury Demand. The Plaintiffs have demanded a jury trial.

6. Trial Length. Plaintiffs estimate that trial will require fifteen (15) trial days. Defendants believe that the jury will be asked, in one or more trials, to consider specific evidence and required to resolve individual questions regarding the statute of limitations, liability and damages as to each named plaintiff. As a result, Defendants believe that trial of all of the Plaintiffs' claims will require at least thirty (30) trial days.

7. Legal Issues About Which Pretrial Motions Are Contemplated.

a. Plaintiffs' Contemplated Motions.

1) Class certification.

2) Appropriate evidentiary motions.

b. Defendants' Contemplated Motions.

1) Appropriate evidentiary motions.

2) In the event that Plaintiffs are permitted to amend their complaint to renew claims the Court has dismissed for failure to comply with state and federal tort claims acts, Defendants may move for summary judgment dismissing those claims under applicable statutes of limitations.

8. Mediation. The parties believe that this case is appropriate for designation as a "mediation case" pursuant to LR 16.2.



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DATED this ____ day of February, 1999.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 22, 1999, a copy of the foregoing pleading was served upon the following individuals:

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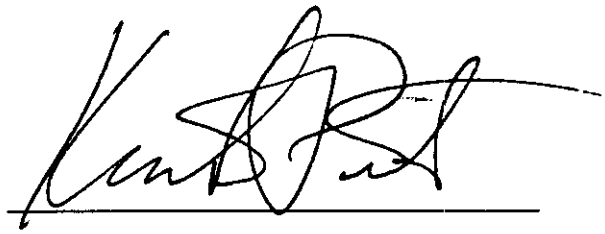



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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | |
|---|---|
| HAROLD BIBEAU and MELANIE ANN DOOYEN BIBEAU on Their Own Behalf and as Representatives of Classes of Similarly Situated Persons,<br><br>Plaintiffs,<br><br>v.<br><br>PACIFIC NORTHWEST RESEARCH FOUNDATION, INC., a Washington Corporation; BATTELLE PACIFIC NORTHWEST LABORATORIES, a division of BATTELLE MEMORIAL INSTITUTE, INC., an Ohio Corporation; MAVIS ROWLEY; DR. DANIEL DIIACONI, in his individual and former official capacity; DR. FERNANDO LEON, in his individual and former official capacity; ROBERT D. WILDMAN, in his individual and former official capacity; DR. JOHN RANDOLPH TOTTER, in his individual and former official capacity; DR. JAMES LESLIE LIVERMAN, in his individual and former official capacity; ROBERT L. FERGUSON, in his individual and former official capacity; and JOHN/JANE DOE DEFENDANTS (1-n), in their | Case No. 95-6410<br><br>ORDER |

1 - ORDER

99

individual and offical capacities, )
)
Defendants. )
)

EOGAN, J.

I. INTRODUCTION

Plaintiffs, husband and wife, on their own behalf and as representatives of a class of similarly situated persons, claim that from 1963 to 1973 defendants conspired to fraudulently induce prisoners in the custody of the Oregon Department of Corrections (DOC) to volunteer for a program of experiments (the "Heller experiments") testing the effects of radiation exposure to the testes. As part of the experiments, the subjects' testes were irradiated with x-ray radiation and injected with radioactive substances. Participation in the experimen uired subjects to undergo biopsies and to agree to a vasectomy as a condition of participation. Plaintiffs allege that the subjects were not fully informed of all potential risks. Plaintiffs allege that although consent was given, it was not sufficiently well-informed to be valid. Plaintiffs also allege that the subjects were induced to volunteer by financial incentives which were so far in excess of the prevailing wage in prison jobs available to them as to be "coercive." One named plaintiff, Mr. Bibeau, was an experiment subject. The experiments allegedly caused physical and emotional harm.

The Heller experiments are named after the doctor who headed the program; he is now deceased. Approximately 67 prisoners participated in the Heller experiments. They were conducted pursuant to a contract between the Atomic Energy Commission (AEC) and defendant general contractor Pacific Northwest Research Foundation, Inc. (PNRF). The experiments "appear to have been designed to investigate, *inter alia*, the long-term effects of radiation exposure on nuclear workers and on future pilots of a then-proposed nuclear-powered airplane." Amended Complaint (A.C.), ¶ 1.

Plaintiffs allege that defendants engaged in a conspiracy to conceal the true nature of the experiments, thereby obstructing plaintiffs' access to the courts. Plaintiffs allege they did not know the true facts of the Heller experiments until

> [i]n or about December 1993, [when,] after decades of secrecy, silence, and denials, the United States government, through public disclosures made by the Department of Energy (the "DOE") and by DOE Secretary Hazel O'Leary ("O'Leary"), began to reveal some of the horrible details of the human radiation experiments conducted, funded and/or otherwise sponsored by the United States government during the Cold War through various predecessor agencies of the DOE, and in conjunction, collaboration and conspiracy with private medical institutions and, in some cases, state authorities.

A.C., ¶ 2.

The amended complaint names as defendants several doctors, corporations and corporate agents involved with the experiments, and lists ten claims for relief:

FEDERAL CLAIMS

1. 42 U.S.C. § 1983

Fifth Amendment claims:

- substantive due process (right to bodily integrity)
- substantive due process (right of access to the courts)
- procedural due process (right of access to the courts)

Fourth Amendment claims:

- unreasonable search and seizure

Eighth Amendment claims:

- cruel and unusual punishment

2. Bivens actions

Same rights allegedly violated as in the section 1983 claims.

STATE CLAIMS

3. Fraud

4. Battery

5. Intentional Infliction of Emotional Distress

6. Strict Liability for Inherently Ultrahazardous Activities

7. Negligence and Gross Negligence

8. Loss of Consortium

9. Breach of Fiduciary Duty

OTHER

10. Civil Responsibility for Crimes Against Humanity

All defendants are named in each claim for relief except for claim 9 (breach of fiduciary duty) which names only some.

The complaint proposes three separate classes: Class I consists of the inmate experiment subjects; Class II consists of family members of experiment subjects; Class III is the medical monitoring class--it consists of all those natural children conceived by members of class I after they were subjected to the Heller experiments.

Several defendants have moved to dismiss the amended complaint. There are five separate motions.

**II. BATTELLE'S MOTIONS TO DISMISS (## 31, 68)**

Battelle Memorial Institute, Inc. (Battelle) allegedly provided equipment, facilities and technical advice, support and review to Heller and his assistant and analyzed specimens and samples obtained from the experiment subjects. Battelle allegedly received funds over several years pursuant to contract with the AEC to conduct the Heller experiments.

Pursuant to Fed. R. Civ. P. 12(b)(6), Battelle asks that all claims asserted against it (i.e. claims 1-8, 10) be dismissed because they are barred by either the statute of limitations or the statute of ultimate repose.

Alternatively, Battelle moves to dismiss (1) the federal claims because plaintiffs have failed to allege sufficient facts to support any claim against Battelle,

whose alleged role in the experiments was peripheral; (2) plaintiffs' sixth claim for relief (ultrahazardous activities), because the administration of X-Rays, by itself, is not ultrahazardous; and (3) plaintiffs' tenth claim for relief (crimes against humanity) for failure to state a claim.

A. **FAILURE TO STATE A CLAIM AGAINST BATTELLE (Federal Claims)**

Since Battelle is a private actor, plaintiffs seek to hold it liable under section 1983 and Bivens via its status as a co-conspirator with the state and federal actors. Adickes v. S.H. Kress, 398 U.S. 144, 149 (1970) (private parties jointly engaged with state actors in prohibited actions are acting "under color of law"). To make such a showing, a plaintiff must allege that defendant was a "willful participant in joint activity with the State or its agents." Id. at 152.

Battelle argues plaintiffs have not alleged facts showing that Battelle was a participant in the conspiracy, nor have they alleged facts that support any of their claims against Battelle in the absence of a conspiracy. Battelle argues the complaint alleges only that Battelle provided peripheral technical support for the experiments.

Plaintiffs' most detailed allegations concerning Battelle's role are:

36. Defendant Battelle participated in the

> Heller Experiments in the following ways, without limitation: by calibrating the X-ray machinery utilized in the Heller Experiments to irradiate the victims' testes; by providing to Heller for use in the Experiments various pieces of scientific equipment, including an electron microscope; by furnishing technical advice to Heller, defendant Rowley and others involved in the Experiments; by analyzing in its laboratories various samples extracted from the victims; by allowing Heller and Defendant Rowley to use its laboratory facilities; and by reviewing of the various proposals for modification of the Protocol (as defined infra) submitted by Heller and defendants Rowley and PNRF at the specific request of the AEC.

A.C. ¶ 36.

Plaintiffs do not claim that Battelle played any role in the Experiments themselves:

> 82. In designing and administering the Experiments, Heller and defendant PNRF, as the contractor for the AEC, were given wide latitude by the AEC and the Bivens defendants and discretion to develop the Protocol for the Experiments, and conduct the Experiments.
>
> 83. The AEC delegated to Heller and defendants PNRF and Rowley the authority, without limitation: to solicit and select the victims, to create "consent" forms, to determine the dosage, timing, and quantity of exposure to x-rays administered to the victims.

A.C. ¶¶ 82, 83. Thus, Battelle argues, the complaint alleges that the experiments were designed and conducted by parties other than Battelle.

It is not necessary to show Battelle participated in the day-to-day administration of the experiments, however. Plaintiffs must merely allege involvement and facts from which could be inferred a meeting of minds as to purpose.

United Steelworkers of America v. Phelps Dodge, 865 F.2d 1539, 1541 (9th Cir. 1989) ("each participant must at least share the common objective of the conspiracy"). Still, vague, conclusory allegations of conspiracy are insufficient to withstand a motion to dismiss. Ivey v. Board of Regents of Univ. of Alaska, 673 F.2d 266 (9th Cir. 1982). In Ivey, the plaintiff claimed his university employment was terminated because of his efforts to advance desegregation. The complaint alleged, generally, that a local municipality had provided funding and administration to the university, and that the challenged racial segregation resulted from illegal actions by all defendants. The court upheld the municipality's dismissal, holding the allegations too general, and unsupported by "reference to specific actions, practices, or policies." Id. at 268.

Plaintiffs here have not alleged facts supporting their allegations that Battelle was a co-conspirator. See A.C., ¶¶ 127, 130-136. Because plaintiffs' Bivens and section 1983 claims against Battelle rely on Battelle's alleged co-conspirator status, Battelle's motion is granted as to the federal claims (claims 1 and 2).

**B. STATUTE OF ULTIMATE REPOSE, ORS 12.115(1)**

The statute of ultimate repose issue is raised by defendant DiIaconi, as well as Batelle.

ORS 12.115(1) provides, in part:

In no event shall any action for negligent injury

> to person or property of another be commenced more than 10 years from the date of the act or omission complained of.

The conduct from which the seventh claim for relief (negligence or gross negligence) arises admittedly ceased in 1973. See, Amended Complaint, ¶ 59. Battelle's and DiIaconi's motions to dismiss are granted as to the negligence claim (claim 7).

Battelle and DiIaconi also seek to apply ORS 12.115(1) to the other claims for relief, relying on Johnson v. Star Machinery Co., 270 Or. 694 (1975). That case held that the negligence statute of ultimate repose was applicable to the then newly emerging tort of products liability. The court reasoned that, had the legislature known of products liability or anticipated its development, it would have included such cases within the purview of the statute. The Johnson case is not properly extended to all other areas of tort law. The other claims for relief (e.g. fraud, battery, intentional infliction of emotional distress, strict liability, loss of consortium, breach of fiduciary duty) were known to the legislature when it enacted ORS 12.115(1).

**C. STATUTE OF LIMITATIONS, ORS 12.110 (State Law Claims)**

Battelle's motion asks that all state and federal claims be dismissed under ORS 12.110. Because this court has already decided that the Amended Complaint does not

state a claim for relief against Battelle on the federal claims, only the state law claims are discussed in this section.

Defendants Totter and Liverman (Bivens defendants) and DiIaconi also raise the statute of limitations issue with respect to the state claims and their arguments are addressed herein. Defendants maintain that even if not barred by the statute of repose, plaintiffs' claims are barred by ORS 12.110, which establishes a two year statute of limitations for "any injury to the person or rights of another."

Relying on Doe v. American Red Cross, 322 Or. 502 (1996) and Gaston v. Parsons, 318 Or. 247 (1994), plaintiffs argue that the statute of limitations on the state claims begins to run when, among other factors, a plaintiff discovers that he or she has suffered "legally cognizable harm." American Red Cross, 322 Or. at 511; Gaston, 318 Or. at 255. Both cases hold that harm is legally cognizable if it is the result of "tortious conduct." The Amended Complaint alleges that plaintiffs did not discover, could not have discovered, or in the exercise of due diligence have reason to discover the critical facts regarding the acts perpetuated by defendants until a speech given by Department of Energy Secretary Hazel O'Leary in December of 1993. A.C., ¶ 2.

In American Red Cross, 322 Or. 502, a plaintiff

brought an action on behalf of her deceased husband seeking damages resulting from allegedly negligent transmission of the HIV virus to her husband during a transfusion in 1985. In 1987, plaintiff's husband was informed that the blood defendant had provided may have been HIV positive. Plaintiff's husband tested positive shortly thereafter. On defendants' motion for summary judgment, plaintiff conceded that she and her husband knew more than two years prior to filing suit that her husband was HIV positive, that his condition could lead to serious illness or death, and the HIV positive condition was the result of having received tainted blood from defendants. Nevertheless, the court concluded that plaintiff's claim was not time barred as a matter of law since there was a question of fact as to whether plaintiff and her husband "had notice that his HIV infection might have been caused by defendants' tortious conduct." Id. at 512. According to the court, "[w]hether a reasonable person of ordinary prudence would be aware of a substantial possibility of tortious conduct is a question of fact that depends upon the nature of the harm suffered, the nature of the medical procedure, and other relevant circumstances." Id. (citing Gaston, 318 Or. at 256).

Plaintiffs here claim it cannot be said that they should have been aware of the tortious nature of defendants' conduct as a matter of law prior to O'Leary's speech, because defendants withheld facts, made false assurances,

and fraudulently concealed information. Plaintiffs' memorandum argues that

> [w]hile Mr. Bibeau may have been aware that he was subjected to what he ambiguously understood to be "x-ray radiation" and other tests in association with some kind of experimental program during his imprisonment, and while he experienced certain health defects, about which he may have harbored suspicions concerning their connection to the Experiments (but which were discounted and assuaged due to the assurances of Heller and defendant medical professionals), not only could he not have reasonably understood defendants' conduct to be "tortious," he could not have discovered the "critical facts" surrounding the existence of his injuries and their connection to defendants' conduct.

Response, p. 13.

Those "critical facts" of which plaintiffs argue they could not have been aware are:

1. The quantity and significance of the dose they received.
2. The true purposes of the experiment.
3. That defendants failed to take adequate precautions in performing the experiments.
4. That Heller and defendants were aware that the radiation utilized could cause cancer and other short and long term harmful effects, and thus, that plaintiffs were lied to, and their consent was fraudulently induced.
5. That they had been injected with radioactively labeled hormones and other substances.
6. That the doses of radiation and other substances they

received as part of the Experiments have significantly increased their likelihood of contracting further serious injury and/or disease.

7. That the defendants did not provide the requisite scientific or medical knowledge that would have allowed them to evaluate the radiation doses.

8. That defendants perpetrated a conspiracy to cover up the nature and extent of the experiments.

See, Response, pp. 25-26.

Plaintiffs note that even after the O'Leary speech and purported new era of openness, plaintiffs' attempts to obtain facts about the Heller experiments were rebuffed. Indeed, as a result of the Bibeau's numerous inquiries, O'Leary herself wrote a letter to the DOC requesting information on the Heller experiments. The director of DOC's letter in response acknowledges the government's prior "unwillingness to acknowledge responsibility for the research." In responding directly to Mr. Bibeau, the DOC director, as late as January 6, 1994, stated ". . . I'm afraid I can provide you with little information about the study. We do not have records as to the date and nature of your participation in the study." See, Response, pp. 24-25, n. 16.

Defendants retort that in 1976 and 1977 at least eleven actions were filed by subjects of the Heller experiments. All were eventually settled and/or dismissed.

Obviously, defendants argue, the inmate subjects who filed these cases knew enough about the experiments and their alleged injuries to file complaints 20 years ago. The most recent similar inmate claim considered by this court was dismissed on statute of limitations grounds. See, Schoonover v. Oregon, Civ. No. 88-6597 (D.Or. 1989). Several other similar cases were also previously dismissed on statute of limitations grounds by judges of this court. (These dismissals were prior to Gaston and American Red Cross). Defendants further argue that because the Oregon legislature provided, in 1987, for persons who were subjected to radiation while inmates to receive an annual evaluation of the effects of the radiation, plaintiffs must be charged with knowledge of the statute, and 1987 must serve as the latest date when their claims could have accrued. Even if members of the putative class were incarcerated in 1987, defendants argue, their claims accrued no more than five years later, pursuant to ORS 12.160 (which suspends the statute of limitations for a maximum of five years for minors, the insane and the imprisoned). At the latest, defendants contend, the statute began to run in 1992, barring claims after 1994. The present action was filed in 1995.

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

which would entitle him to relief." Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). In reviewing a 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986), regardless of plaintiffs' ability to prove their allegations, or possible difficulties in making such proof. Allison v. California Adult Auth., 419 F.2d 822, 823 (9th Cir. 1969). Plaintiffs' Amended Complaint alleges facts which, if true, give rise to a possible inference that although plaintiffs may have had serious suspicions, they did not have knowledge that defendants' acts were tortious, and thus that they had a cognizable claim, and could not have had this knowledge until after the 1993 O'Leary speech and subsequent revelations by the government. At the minimum there appears to be a fact issue on this point. The fact that eleven suits were brought in 1977 and 1978 does not settle the matter. See Conmar v. Mitsui, 858 F.2d 499, 504 (9th Cir. 1988) (separate suit brought earlier making similar allegations arising out of same event did not put plaintiff on notice of claims as a matter of law, even if plaintiff had known of it); In re Swine Flu Products Liab. Litig., 764 F.2d 637, 640 (9th Cir. 1985) (genuine issue existed regarding whether plaintiff was accountable for public accounts and community awareness of link between

defendants' conduct and injury; defendants' summary judgment motion denied).

Defendants' motions to dismiss the state claims based on the statute of limitations are denied.

D. **X-RAYS AS AN ULTRAHAZARDOUS ACTIVITY**

Battelle cites two cases concerning the therapeutic use of x-rays in an attempt to show the Heller experiments' use of x-rays was not ultrahazardous as a matter of law. See, Brown v. Cromerford, 99 Or. App. 60, 63 (1989); Koos v. Roth, 293 Or. 670, 682 (1982). These cases deal solely with x-rays in a therapeutic context. Battelle's argument ignores the allegation that the Heller experiments administered non-therapeutic doses to susceptible body areas and does not address other alleged aspects of the experiments (e.g., testicular injections of hormones and radioactive substances, testicular biopsies and other tests, etc.).

The Restatement (Second) of Torts, section 520, as adopted in Koos v. Roth sets forth the standard for determining whether an activity is abnormally dangerous. The amended complaint alleges the elements. First, it alleges that the experiments posed risk of serious injury, known at the inception of the experiments. A.C., ¶ 92. Second, that the risks created could not have been eliminated with reasonable care. A.C., ¶¶ 182, 184, 185. Third, that the experiments were unique and not a matter of

common usage. A.C., ¶ 1. Fourth, that they were inappropriate to the place in which they occurred (because of coercive prison environment). A.C., ¶¶ 67-70. Finally, that the value to the community derived from the experiments is far outweighed by the adverse impact on the subjects. A.C., ¶¶ 182, 184, 185. Because there is a genuine issue as to whether the Heller experiements' use of x-rays was ultrahazardous under the above criteria, Battelle's motion is denied as to this claim.

E. CIVIL CRIMES AGAINST HUMANITY

Battelle moves to dismiss plaintiffs' tenth claim for relief ("Civil Responsibility for Crimes Against Humanity"), arguing that there is no recognized action for "civil liability for crimes against humanity." The Bivens defendants and PNRF and Rowley also raise this point.

Plaintiffs claim that international law, and specifically the International Covenant on Civil and Political Rights, 6 I.L.M. 368, and the Nuremburg Code, provide an enforceable body of law which gives rise to their tenth claim for relief. The Covenant, while a treaty, is not self-executing, and therefore does not give rise to privately enforceable rights under United States law. Igartua de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994), cert. denied, 115 S.Ct. 1426 (1995).

As to the Nuremberg Code argument, plaintiffs rely on In re Cincinnati Radiation Litig., 874 F.Supp. 796

(S.D.Ohio 1995), a case involving government sponsored radiation experiments conducted on cancer patients who were falsely told they were receiving cancer treatment. The relevant portion of that decision occurs in the context of denying a motion to dismiss a section 1983 claim for an alleged violation of substantive due process. The complaint in that claim did not contain an independent claim based on the Nuremburg Code. The court in In re Cincinnati held that substantive due process protects an individual from nonconsensual medical experimentation and that the complaint therefore stated a claim under the Constitution. The court further held that defendants were not entitled to qualified immunity because their actions were beyond the scope of their delegated powers. Id. at 814.

The court's discussion of the Nuremburg Code was dictum, and did not discuss whether the Code could form the sole basis for a cause of action. Rather, the discussion of the Code had to do with whether there existed a clearly established right for purposes of a qualified immunity analysis. The Code is a part of the final judgment of a military tribunal in one of the trials which occurred in Nuremburg, Germany after World War II; it does not purport to create causes of action for private litigants.

Plaintiffs argue that Justice O'Connor's dissent in United States v. Stanley, 483 U.S. 669, 708-710 (1987) supports the conclusion that they have stated a valid claim.

Stanley involved whether a plaintiff serviceman was entitled to bring a Bivens action against defendants who surreptitiously gave him LSD. Defendants had acted according to an Army plan to study the effects of drugs on humans. The majority decided against plaintiff, holding that a Bivens action is not available for "injuries that arise out of or are in the course of activity incident to service." 483 U.S. at 684. Justice O'Connor opined that due process should guarantee as much as the Nuremberg Code, and thus she would have decided that a Bivens action could lie. Id. at 710 (O'Connor, J., dissenting). Her dissent has been adopted as controlling in situations not involving military service. See, In re Cincinnati, 874 F.Supp. 796; Whitlock v. Duke Univ., 637 F.Supp. 1463 (1986).

Like the decision in In re Cincinnati, Justice O'Connor's dissent does not purport to create a right of action directly out of the Nuremberg Code or any other body of international law. Battelle's, PNRF and Rowley's, and the Bivens defendants' motions to dismiss plaintiffs' tenth claim for relief are granted.

II. DILACONI'S MOTION TO DISMISS (#57)

At the time of the experiments, Dr. DiIaconi was an employee, agent and/or contractor of the DOC. He is sued in his individual capacity as well as his former official capacity. Dr. DiIaconi is alleged to have assisted Dr. Heller in extracting seminal fluid, semen, urine and

biopsies from the inmates involved. A.C., ¶ 36. Plaintiffs allege he assisted Heller in interviewing, selecting, supervising, counseling, coercing and practicing non-therapeutic experimental medicine on the inmates. A.C., ¶ 38. Plaintiffs also allege he assisted others in performing vasectomies, biopsies, and/or other invasive procedures on the inmates. A.C., ¶ 42.

DiIaconi moves to dismiss on four grounds (1) statute of ultimate repose; (2) statute of limitations; (3) collateral estoppel; and (4) qualified immunity.

DiIaconi's statute of ultimate repose argument is meritorious only as to the negligence claim, as discussed above in section II.B.

**A. STATUTE OF LIMITATIONS (Federal Claims)**

The Bivens defendants also raise the statute of limitations issue as to the federal claims. The limitations period for both the Bivens and section 1983 claims is borrowed from the personal injury statute of the state in which the action is pending. Wilson v. Garcia, 471 U.S. 261, 268 (1985). With respect to federal accrual law, defendants' argument is essentially the same as their state law argument: that plaintiffs allegedly knew, or should have known, the critical facts surrounding their injuries, and the causes of those injuries, more than two years prior to filing this action. Plaintiffs claim that the discovery rule applies. Under the discovery rule, which is most often

applied in a medical malpractice setting where plaintiffs can have difficulty discovering the critical facts regarding manifestation of an injury and/or its causes, claims do not begin to accrue until the critical facts associated with the claims become known, or should have become known.

In Barrett v. United States, 689 F.2d 324, (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983), plaintiff brought an action under the Federal Tort Claims Act and section 1983 alleging negligence in the creation and administration of an army chemical weapons experiment and conspiracy to cover up facts of plaintiff's decedent's death after being injected with mescaline while unknowingly serving as a test subject. The Barrett court first noted that while most common in the medical malpractice area, the discovery rule

> may be appropriate in non-malpractice cases where plaintiffs face comparable problems in discerning the fact and cause of their injuries. . . For example, the diligence-discovery rule has been applied where . . . the Government conceals its negligent acts so that the plaintiff is unaware of their existence. . . [R]ead into every federal statute of limitations is the equitable doctrine that in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit.

Id. at 327.

The Ninth Circuit endorsed the diligence-discovery rule in In re Swine Flu, 764 F.2d 637, where the court held that the rule that a claim accrues at the time of the injury

has been supplanted in cases where the nature of the tort, or the character of the injury, prevent knowledge of the injury and/or its causes. Relying on Barrett, the Ninth Circuit recognized that a plaintiff who may be blamelessly ignorant of the existence or cause of his injury should be accorded the benefits of the more liberal accrual standard. 764 F.2d at 639-640.

Plaintiffs claim that the discovery rule applies here because of the presence of four factors: (1) the injuries suffered by the subjects are latent (e.g. significantly increased risk of cancer)--by definition they have no current manifestations and are nearly impossible to discover without further material information; (2) nearly all physical injuries suffered involve complex scientific causal relationships, requiring data and scientific knowledge about radiochemistry and health physics, available only to a small group of scientists, many of whom are employees of defendants; (3) defendant doctors and the other defendants assured the victims that any short-term injuries they suffered were either unrelated to the experiments or merely transitory and that the experiments would have no long-term health effects; and (4) defendants deliberately withheld, and fraudulently concealed critical facts central to plaintiffs' claims.

The latter two allegations alone warrant denial of defendants' motions as to the federal claims. In both Swine

Flu, 764 F.2d at 641, and Rosales v. United States, 824 F.2d 799, 804 (9th Cir. 1987), the Ninth Circuit held that where a plaintiff relies on assurances by physicians that their conditions are normal and not the result of any wrongdoing or malpractice, the plaintiff may not be found to have failed to exercise reasonable diligence because he did not earlier pursue his claim. In the instant case, plaintiffs allege that Mr. Bibeau relied on the repeated assurances of Dr. Heller, defendants Drs. DiIaconi and Leon, and defendant Rowley, a medical technician and researcher, and other defendants regarding the purported safety of the experiments and alleged temporary nature of any adverse effects. A.C., ¶¶ 71, 92, 93, 120, 123, 136, 140-149.

Moreover, deliberate withholding and fraudulent concealment of critical facts about a claim has consistently been held to toll accrual. See, e.g., Barrett, 689 F.2d at 324, 333. In Barrett, plaintiff, the daughter of a deceased subject of an army chemical warfare experiment, alleged the government had engaged in conspiracy to cover up critical facts regarding her father's death. The court stated:

> [The decedent's] family knew that he had died and that the direct cause of his death was, at least partly, the mescaline injection. What it was unaware of and had no reason to suspect . . . was that this was a death without reason caused by the government's alleged negligence.

Barrett, 689 F.2d at 329.

Defendants motions to dismiss the federal claims

based on the statute of limitations are denied.

B. COLLATERAL ESTOPPEL

As a preliminary matter, collateral estoppel is a defense and is inappropriately raised on a motion to dismiss. See Blonder-Tongue Lab. v. University of Illinois Found., 402 U.S. 313, 350 (1971) ("[C]ollateral estoppel [is an] affirmative defense[] that must be pleaded.")

In order to establish the defense of collateral estoppel a defendant must show: (1) that a party against whom the defense is asserted was a party to or in privity with a party to a prior lawsuit, and (2) that the issue was fully and fairly litigated in the prior lawsuit. Parklane Hosiery v. Shore, 439 U.S. 322, 327 (1970).

DiIaconi argues plaintiffs' claims are barred by the earlier case of Schoonover v. Oregon, Civ. No. 88-6597 (D.Or. 1989). DiIaconi summarily states that the plaintiff in Schoonover was one of the 67 inmates who was part of the Heller experiments and had the same interests that plaintiffs here assert. This argument is unavailing. Plaintiffs in the present action did not own an interest in the Schoonover suit, were not parties to that case, nor would they have benefitted from the outcome of that case. There is no privity here. In the case cited by DiIaconi, In re Gottheiner, 703 F.2d 1136, 1139 (9th Cir. 1983), a person was considered in privity with a corporation because he owned all or most of its shares and controlled its

activities, and thus he could fairly be said to have had his interests aligned with those of the corporation. DiIaconi's motion based on collateral estoppel is denied.

C. **QUALIFIED IMMUNITY (Substantive Due Process--Right to Bodily Integrity)**

DiIaconi's qualified immunity argument focuses on plaintiffs' substantive due process--right to bodily integrity section 1983 claim. The Bivens defendants also raise the qualified immunity issue as to this claim.

Defendants claim they are shielded from suit by qualified immunity because their conduct did not violate clearly established rights of which a reasonable person would have known. To determine whether an official is entitled to qualified immunity, a court must determine as a matter of law (1) whether the right allegedly violated was clearly established at the time of the alleged violation, and (2) whether, in light of the law, a reasonable official could have believed his conduct to be lawful. Act Up!/Portland v. Bagley, 988 F.2d 686, 871 (9th Cir. 1993).

In Anderson v. Creighton, the Supreme Court determined that for a constitutional right to be established:

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-

existing law the unlawfulness must be apparent.

483 U.S. 635, 640 (1987)(citations omitted).

DiIaconi first argues that "before 1973 [when the experiments terminated] it was not clearly established that prison inmates could not voluntarily consent to medical testing." Memorandum in Support, p. 14. Bivens defendants also raise the issue of voluntariness. However this characterization of the issue distorts the facts as alleged. The subjects of the experiments, although they ostensibly consented to x-ray irradiation of their gonads, allegedly were not fully informed of the effects of the *non-therapeutic* x-ray radiation. Defendants' voluntariness argument fails *at this stage of the litigation* because plaintiffs have alleged that the subjects of the experiments were purposely misled in that they were not informed of the purpose of the experiments nor of the potential (especially long-term) effects of the experiments.

In In re Cincinnati Radiation Litig., 874 F.Supp. 796, 805 (S.D.Ohio 1995), cancer patients, in human radiation experiments contemporaneous with the Heller experiments, were misled as to the purpose and nature of the x-rays to which they were exposed and instead of being told the truth--that they were subjects of non-therapeutic experiments which were done to determine the physical and psychological effects of radiation -- were told the x-ray exposure was therapeutic. The court held that "[w]hen a

person is purposefully misled about such crucial facts as these, he can no longer be said to exercise the degree of free will that is essential to the notions of voluntariness." Plaintiffs have alleged sufficient facts to withstand defendants' voluntariness argument.

Having so decided, the issue here becomes whether, between 1963 and 1973 (the duration of the experiments), there was a clearly established right to bodily integrity. The In re Cincinnati case, involving experiments contemporaneous with the Heller experiments, is again instructive:

> [T]he contours of the right to be free from unwanted bodily intrusions has been developed over a long line of cases. As early as 1884, the Supreme Court recognized that the liberty right of the Fourteenth Amendment protected the integrity of one's body. See Hurtado v. People of California, 110 U.S. 516, 563, 4 S.Ct. 111, 121, 28 L.Ed. 232 (1884). In 1891, the Supreme Court explicitly stated that "no right is more sacred, or is more carefully guarded, by the common law, than the right of every individual to possession and control of his own person, free from all authority of law." Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891).

The right to bodily integrity was also recently recognized to have existed at the time of the Heller experiments in Stadt v. University of Rochester, 921 F.Supp. 1023 (W.D.N.Y. 1996). In that case, a plaintiff brought an action under the Federal Tort Claims Act claiming, *inter alia*, that defendants violated the right to bodily integrity. In 1945, as part of the government's plan to

develop nuclear weapons, plaintiff's decedent was, without her knowledge, allegedly injected with plutonium and studied over a period of several years. In rejecting a defendant's claim of qualified immunity, the court stated that the case involved

> the right to be free from non-consensual experimentation on one's body--the right to bodily integrity--a right which has been recognized throughout this nation's history. See Albright v. Oliver, ___U.S.___, ___, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994) (finding that "the protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.") (citations omitted); Schmerber v. California, 384 U.S. 757, 772, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908(1966) (stating that "[t]he integrity of an individual's person is a cherished value of our society."; Skinner v. State of Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (holding that sterilization performed without consent deprived the individual of a "basic liberty.").

Id. at 1027. See also, Rochin v. California, 342 U.S. 165, 169 (1952) (government's conduct in forcibly extricating narcotics capsules from criminal defendant's stomach violated the Fifth Amendment because the forced stomach pumping "offended those canons of decency and fairness which expressed the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.")

The Bivens defendants' argument that, since many states engaged in non-consensual experiments at the time of the Heller experiments, there cannot be said to be at that time a clearly established right, is meritless. Assuming

these non-consensual experiments are analogous to the Heller experiments, the unconstitutional deprivation of citizens' established rights do not somehow become constitutional merely because they are widespread or frequent. To so argue is to sanction unconstitutional behavior solely because of its repeated occurrence.

This court finds that plaintiffs had a clearly established right to bodily integrity during the time of the experiments such that the defendants should have known that their alleged conduct, if it occured, would violate the Constitution.

**III. PNRF'S AND ROWLEY'S MOTION TO DISMISS (#62)**

PNRF and Rowley move to dismiss plaintiffs' tenth claim for relief ("Civil Responsibility for Crimes Against Humanity"). Dr. Rowley was Dr. Heller's top assistant. Heller and Rowley were "employees, agents, and/or contractors" of PNRF, and are alleged to have conducted the experiments under PNRF's direction and supervision. A.C., ¶ 33. PNRF is alleged to have conducted the experiments under contract with the AEC.

Rowley and PNRF argue that there is no recognized action for "civil liability for crimes against humanity." Their motion is granted for the reasons set out above in the section dealing with defendant Battelle's motion to dismiss (section II.E.).

## IV. TOTTER'S AND LIVERMAN'S ("BIVENS DEFENDANTS") MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT (#64)

Dr. Totter was the director of the AEC's Division of Biology and Medicine from 1967 to 1972. Dr. Liverman was the director of the AEC Division of Biology and Medicine from 1967 to 1972. The complaint does not allege any direct involvement by Totter and Liverman in the Heller experiments; it alleges that "[t]he [Division of Biology and Medicine] was the entity under the AEC with supervisory liability over biomedical research of humans exposed to radiation." A.C., ¶ 26. Totter and Liverman are sued in their individual capacities and former official capacities.

They move to dismiss, and alternatively for summary judgment, on five grounds: (1) lack of personal jurisdiction; (2) absolute immunity; (3) qualified immunity; (4) statute of limitations; and (5) the tenth claim for relief (crimes against humanity) does not state a claim. The merits of grounds (4) and (5) are discussed above as part of the other defendants' similar motions.

### A. PERSONAL JURISDICTION

The Bivens defendants argue plaintiffs' claims against them should be dismissed for lack of personal jurisdiction. Totter and Liverman were successive directors of the AEC's Division of Biology and Medicine (DBM). The complaint alleges that they "oversaw, funded, approved,

supervised, endorsed and/or reviewed the results of the Heller experiments' from the AEC offices in Washington, D.C. A.C., ¶ 30. It further alleges that as directors of the DBM, they were responsible for overseeing the AEC's entire human experimentation program, which included the Heller experiments. A.C., ¶¶ 26-28.

In order to avoid a motion to dismiss for lack of personal jurisdiction, plaintiffs need only make a prima facie showing of facts which support a finding of jurisdiction. Data Disc, Inc. v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). In the absence of a federal statute establishing the territorial extent of a federal court's jurisdiction, a district court must look to the forum state's jurisdictional provisions. Fed. R. Civ. P. 4(k)(1)(A).

Plaintiffs claim this court has jurisdiction pursuant to Or. R. Civ. P. 4D(1) or 4L. Rule 4L confers jurisdiction over a defendant to the extent it is not unconstitutional. Rule 4D reads, in pertinent part:

> D Local injury; foreign act
> In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury either:
>
> D(1) Solicitation or service activities were carried on within this state by or on behalf of defendant. . . .

Because the acts and omissions of the Bivens defendants, as

alleged in the complaint and described in the preceding paragraph fall within the parameters of this rule, the court has jurisdiction. Plaintiffs have alleged sufficient facts to show their alleged injuries arise out of the Bivens defendants out of state conduct. The allegations of the complaint also support the second element of the Rule, that "solicitation or service activities were carried on within this state by or on behalf of the defendant." The complaint alleges that the experiments which Bivens defendants supervised were carried out, on their behalf and on behalf of the AEC, on Oregon citizens in an Oregon facility by Oregon public officials and private persons.

Alternatively, even if Rule 4D(1) is inapplicable, the court has jurisdiction under the "catch all" provision of Rule 4L, which confers jurisdiction over non-resident defendants to the outer limits of due process. Fone v. America, Inc. v. Integretel, Inc., 779 F.Supp. 497 (D.Or. 1991).

In analyzing whether the exercise of personal jurisdiction over a defendant comports with due process, the Ninth Circuit asks three questions: (1) whether the defendant has done some act to consummate some transaction within this forum, (2) whether the claim arises out of the transaction, and (3) whether the exercise of jurisdiction over the defendant would be reasonable. Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1194 (9th Cir. 1988). Viewed

in the light most favorable to plaintiffs, the amended complaint makes out a prima facie case for the exercise of jurisdiction over the Bivens defendants under the Sinatra test: as directors of DBM, Totter and Liverman wilfully authorized and supervised the experiments in Oregon, as a result of which plaintiffs suffered injuries, giving rise to their claims here.

Defendants argue that foreseeability of an in-state effect is an insufficient basis for the exercise of jurisdiction over a non-resident defendant. However, it was not merely foreseeable, but indeed certain that the experiments would have effects in Oregon: the experiments were conducted on a captive Oregon population. The injuries for which plaintiffs now seek redress stem directly from defendants' forum-related activities. Moreover, the amended complaint alleges that the Bivens defendants conspired with Oregon state officials and private contractors to perform the tortious acts complained of here. In Ziegler v. Indian River County, 64 F.3d 470 (9th Cir. 1995), the court held that a conspiracy by a non-resident defendant to enlist others within the forum state to commit a tortious act amounted to a "purposeful injection" into the forum state and provided an appropriate basis for the exercise of personal jurisdiction over the non-resident defendant. This court finds that it has personal jurisdiction over the Bivens defendants.

B. ABSOLUTE IMMUNITY

Bivens defendants claim the state law tort claims against them (claims 3 through 9) are barred as a matter of law and that the United States must be substituted as defendant on these claims pursuant to the Westfall Act, 28 U.S.C. § 2679(b), which provides that an action against the United States under the Federal Tort Claims Act shall be the exclusive remedy for the negligent or wrongful act or omission of any employee of the government committed while the employee was acting within the scope of office or employment. Section 6 of the Westfall Act states that "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States . . . and the United States shall be substituted as party defendant." 28 U.S.C. § 2679(d)(1). "Upon certification, the employee is dismissed from the action and the United States is substituted as defendant. The case then falls under the governance of the Federal Tort Claims Act." Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2229 (1995).

The Attorney General's designee has certified that Drs. Totter and Liverman were acting within the scope of their office or employment as employees of the government at

the time of the experiments. Plaintiffs concede that the government must be substituted for Totter and Liverman for claims 3 through 9. Defendants Totter's and Liverman's motion to dismiss is granted with respect to claims 3 through 9 without prejudice to plaintiffs' right to further amend the complaint to conform to the Westfall Act and to add a claim for negligent supervision.

C. QUALIFIED IMMUNITY

The Bivens defendants' qualified immunity arguments focus on plaintiffs' substantive due process--right to bodily integrity claim; on the substantive due process--right of access to the courts section 1983 claim; and on the procedural due process--right of access to the courts Section 1983 claim. The first of these is discussed above in the section dealing with DiIaconi's claim of qualified immunity.

As noted above, to determine whether an official is entitled to qualified immunity, a court must determine as a matter of law (1) whether the right allegedly violated was clearly established at the time of the alleged violation, and (2) whether, in light of the law, a reasonable official could have believed his conduct to be lawful. Act Up!/Portland v. Bagley, 988 F.2d at 871.

1. The Right of Access to the Courts

a. Substantive Due Process

Plaintiffs contend all defendants

violated plaintiffs' substantive right of access to the courts by concealing the critical facts of the experiments from the subjects. The right of access to the courts is a fundamental right grounded in the due process clause. See Wolff v. McDonald, 418 U.S. 539, 556 (1974). A constitutional violation of the right of access has occurred when

> [s]tate officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled.

Crowder v. Sinyard, 884 F.2d 804, 812 (5th Cir. 1989) (citing Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983). This right was clearly established at the time of the Heller experiments. See Johnson v. Avery, 393 U.S. 483 (1969); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Brinkerhoff-Ferris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930); see also In re Cincinnati, 874 F.Supp. at 824 (right of access to the courts clearly established at time of non-consensual cancer radiation experiments conducted between 1960 and 1972).

**b. Procedural Due Process**

Plaintiffs claim that all defendants violated plaintiffs' procedural due process rights by concealing the critical facts of the experiments from the

subjects. As early as 1882, the Supreme Court held that a cause of action is a type of property interest encompassed by the due process clause of the Fourteenth Amendment. See Pritchard v. Norton, 106 U.S. 124, 132 (1882) ("[a] vested right of action is property in the same sense in which tangible things are property, and is equally protected from arbitrary interference.") This right was clearly established at the time of the alleged conduct so that a reasonable official would have known his conduct violated the law.

This court finds that the rights allegedly violated were clearly established at the time of the Heller experiments. The Bivens defendants' motion to dismiss based on qualified immunity is denied.

V. CONCLUSION

Defendant Battelle's motions to dismiss (## 31, 68) are GRANTED IN PART AND DENIED IN PART as follows: granted as to the federal claims (claims 1 and 2), granted as to the negligence claim (claim 7), granted as to the crimes against humanity claim (claim 10), denied as to the remainder. Defendant DiIaconi's motion to dismiss (#57) is GRANTED IN PART AND DENIED IN PART as follows: granted as to the negligence claim (claim 7), denied as to the remainder. Defendants PNRF and Rowley's motion to dismiss (#62) is GRANTED. Defendants Totter and Liverman's (Bivens defendants) motion to dismiss (#64) is GRANTED IN PART AND DENIED IN PART as follows: granted as to the state claims

(claims 3 through 9), granted as to the crimes against humanity claim (claim 10), denied as to the remainder. Plaintiffs' are allowed 30 days leave to amend the complaint as discussed herein.

IT IS SO ORDERED.

DATED this 27th day of September, 1996.

Michael R. Hogan
UNITED STATES DISTRICT JUDGE